No. 06-219
Title: Charles Wilkie, et al., Petitioners
v.
Harvey Frank Robbins
Docketed: August 11, 2006
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (04-8016)
Decision Date: January 10, 2006
Rehearing Denied: March 14, 2006
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Jun 2 2006 | Application (05A1118) to extend the time to file a petition for a writ of certiorari from June 12, 2006 to July 12, 2006, submitted to Justice Breyer. |
| Jun 5 2006 | Application (05A1118) granted by Justice Breyer extending the time to file until July 12, 2006. |
| Jun 28 2006 | Application (05A1118) to extend further the time to file a petition for a writ of certiorari from July 12, 2006 to August 11, 2006, submitted to Justice Breyer. |
| Jun 28 2006 | Application (05A1118) granted by Justice Breyer extending the time to file until August 11, 2006. |
| Aug 11 2006 | Petition for a writ of certiorari filed. (Response due September 11, 2006) |
| Sep 7 2006 | Order extending time to file response to petition to and including October 11, 2006. |
| Oct 3 2006 | Order further extending time to file response to petition to and including October 25, 2006. |
| Oct 25 2006 | Brief of respondent Harvey Frank Robbins in opposition filed. |
| Nov 5 2006 | Reply of petitioners Charles Wilkie, et al. filed. (Distributed) |
| Nov 7 2006 | DISTRIBUTED for Conference of November 21, 2006. |
| Nov 27 2006 | DISTRIBUTED for Conference of December 1, 2006. |
| Dec 1 2006 | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, January 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 2, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 16, 2007. |
| Dec 22 2006 | Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including January 16, 2007. |
| Jan 10 2007 | Extension of time within which to file respondent's brief on the merits to and including February 20, 2007. |
| Jan 16 2007 | Joint appendix filed. |
| Jan 16 2007 | Brief of petitioners Charles Wilkie, et al. filed. |
| Jan 16 2007 | Brief amici curiae of National Wildlife Federation, et al. filed. |
| Jan 17 2007 | SET FOR ARGUMENT ON Monday, March 19, 2007. |
| Feb 5 2007 | Record received from U.S.C.A. for 10th Circuit. (1 box) |
| Feb 5 2007 | CIRCULATED. |
| Feb 6 2007 | Record received from U.S.D.C. for District of Wyoming. (2 boxes) |
| Feb 6 2007 | Consent to the filing of amicus briefs in suport of either party received from counsel for |

the respondents.

Feb 16 2007 Brief amicus curiae of Paragon Foundation, Inc. filed. (Distributed)

Feb 19 2007 Brief amici curiae of Pacific Legal Foundation, et al. filed. (Distributed)

Feb 19 2007 Brief amici curiae of Public Lands Council, et al. filed. (Distributed)

Feb 19 2007 Brief amicus curiae of Oregon Cattlemen's Association, et al. filed. (Distributed)

Feb 19 2007 Brief amici curiae of New Mexico Cattle Growers' Association, et al. filed. (Distributed)

Feb 20 2007 Brief of respondent Harvey Frank Robbins filed. (Distributed)

Feb 20 2007 Brief amici curiae of Brooks Realty and Burgett Geothermal Greenhouses, Inc. filed. (Distributed)

Feb 20 2007 Brief amicus curiae of Mountain States Legal Foundation filed.

Mar 12 2007 Reply of petitioners Charles Wilkie, et al. filed. (Distributed)

Mar 19 2007 ARGUED. For petitioners: Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: Laurence H. Tribe, Cambridge, Mass.

Supreme Court, U.S.
FILED

06-219 AUG 11 2006

OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case involves a damages action brought against officials of the Bureau of Land Management in their individual capacities based on alleged actions taken within the individuals' official regulatory responsibilities in attempting to obtain a reciprocal right-of-way across private property intermingled with public lands. The following questions are presented:

1. Whether government officials acting pursuant to their regulatory authority can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, of the predicate act of extortion under color of official right for attempting to obtain property for the sole benefit of the government and, if so, whether that statutory prohibition was clearly established.

2. Whether respondent's *Bivens* claim based on the exercise of his alleged Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

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# In the Supreme Court of the United States

No.

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 438 F.3d 1074. An earlier opinion of the court of appeals (App., *infra*, 76a-84a) is reported at 300 F.3d 1208. The opinion of the district court (App., *infra*, 27a-48a) is unreported. An earlier opinion of the district court (App., *infra*, 49a-75a) is reported at 252 F. Supp. 2d 1286.

## JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006 (App., *infra*, 85a-86a). A petition for rehearing was denied on March 14, 2006. On June 5, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 12, 2006. On June 28, 2006, Justice Breyer further extended the time to August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> * * * nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The Hobbs Act provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. 1951.

## STATEMENT

1. a. Under its Property Clause power, Congress has enacted numerous statutes governing the use of federal lands. The Secretary of the Interior is authorized under 43 U.S.C. 1761(a), a provision of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, to grant

rights-of-way over federal lands. FLPMA requires the Secretary to "take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. 1732(b). Similarly, under 43 U.S.C. 315(a), a provision of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, the Secretary has the authority to grant owners of land adjacent to grazing districts rights-of-way over federal land in those districts. The Secretary has the power to "do any and all things necessary" to accomplish the purposes of the Act. 43 U.S.C. 315a.

The Bureau of Land Management (BLM), an agency within the Department of the Interior, has provided that it is the Secretary's objective to grant rights-of-way to business entities, among others, and to "regulate, control and direct" the use of those rights-of-way on public land to "[p]rotect the natural resources associated with the public lands" and to "[p]revent unnecessary or undue environmental damage to the lands and resources." 43 C.F.R. 2800.0-2, (a) and (b). BLM may, if it determines it to be within the public interest, require persons applying for a right-of-way over public land, as a condition for obtaining such right-of-way to give the government a reciprocal "equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. 2801.1-2.

If an applicant for a right-of-way refuses to grant BLM a reciprocal nonexclusive easement, his application may be denied. *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991); see *Frank Robbins*, 146 I.B.L.A. 213, 219 n.4 (1998) (regulation authorizes BLM to "require that a road [right-of-way] applicant grant an equivalent, reciprocal [right-of-way] to the United States as a condition to receiving" a right-of-way under FLPMA). BLM's regulations likewise provide that the agency may include in a grazing permit a "statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. 4130.3-2(h).

b. BLM actions are subject to administrative review, including review by the Interior Board of Land Appeals (IBLA). IBLA decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* *Hoyl* v. *Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997).

2. Respondent, Harvey Frank Robbins, owns the High Island Ranch and Cattle Company, a commercial guest ranch near Thermopolis, Wyoming. Some of the ranch's activities involve use of a Special Recreational Use Permit (SRP), under which ranch guests may participate in cattle drives over federal lands. App., *infra*, 28a-29a. The ranch's private lands are intermingled with public lands. Access to the ranch is over a lengthy dirt road, called the South Fork, Owl Creek Road. C.A. App. 48. The road wanders generally westward from a county road some miles to the east, and it crosses both federal and private lands, including land owned by respondent.

Respondent acquired the High Island Ranch from George Nelson in May 1994. Nelson had obtained a right-of-way over the federal lands along South Fork, Owl Creek Road, which allowed him to perform maintenance on the road. As a condition of that right-of-way, BLM asked Nelson to provide a reciprocal right-of-way in the form of a nonexclusive easement for the same road. Nelson agreed and signed the necessary document, but, apparently because a corporate seal was missing, BLM returned the document to Nelson. Before Nelson sent back the document with a corporate seal, he sold the ranch to respondent, who recorded the deed. BLM determined that this recording of the deed without the easement in favor of the government rendered the easement unenforceable. App., *infra*, 2a; C.A. App. 48-49.

In February 1995, a BLM employee discussed with respondent the possibility of receiving an assignment of Nelson's right-of-way over federal lands, and in April 1995, Charles Wilkie wrote to respondent explaining that such an

assignment was necessary if respondent intended to maintain the road or engage in other than casual use of the road. The letter confirmed that "a condition of the right-of-way is the reciprocal grant of a non-exclusive easement to the United States for administrative access across your deeded lands in the Rock Creek area." The letter enclosed a copy of the easement that Nelson had signed and asked respondent to sign it. C.A. App. 30-39. Respondent did not respond to the letter. On June 16, 1995, BLM issued an interlocutory decision cancelling the right-of-way that Nelson had obtained because respondent had not made the required annual payment and had not signed a reciprocal non-exclusive easement. *Id.* at 40-41. Respondent did not respond, and on July 21, 1995, BLM issued a final decision cancelling the right-of-way. *Id.* at 42-43. Although this final decision was subject to administrative review before the IBLA and judicial review in district court, respondent did not seek review. *Id.* at 49-50.

In July 1997, BLM issued respondent a "cease and desist" notice, which alleged that respondent had "bladed" parts of the road on public land without a right-of-way. "Blading" is a smoothing operation in which loose material is pulled from the side of the road or material is used to fill surface irregularities and restore the road crown. Under 43 C.F.R. 2801.3(a), the use of public lands requiring a right-of-way without authorization is a trespass. In response, respondent submitted an invoice "for emergency repairs to South Fork Road in order to access private property—$2250.00." C.A. App. 49; *id.* at 44. BLM offered to settle the trespass charges for $1617 and offered to entertain an application for a right-of-way, stating explicitly that the reciprocal easement required of respondent would simply allow "access for federal employees in conjunction with their official duties; it would not allow any other type of access." *Id.* at 45. Respondent did not respond, and BLM issued a decision finding that he had trespassed and owed BLM $1617.

Respondent sought review before the IBLA, which upheld the decision. The IBLA held that respondent had admitted the blading when he sent his bill to BLM for the repair and that he had "repeatedly failed to respond to BLM offers concerning the existing [right-of-way], the filing of an application for a new [right-of-way] and, thereafter, the settlement of the trespass." *Frank Robbins*, 146 I.B.L.A. at 218. The IBLA also rejected respondent's allegations that BLM was trying to "blackmail" him into providing a reciprocal right-of-way, and it held that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of this decision.

Respondent also had disputes with BLM over his grazing permit. Based on 43 C.F.R. 4310.3-2(h), the permit stated that respondent was required to "provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." C.A. App. 54. Respondent, however, insisted that BLM employees obtain his advance written permission. The IBLA found that "BLM is authorized reasonable administrative access across [respondent's] private and leased lands" and that "[a]dvance written permission from [respondent] shall not be required." *Ibid.* The IBLA later ruled that "administrative access is an implied condition of a grazing permit" when such access is necessary for BLM to carry out its statutory duties. *Id.* at 56; see *id.* at 61. The IBLA explicitly rejected the argument that administrative access constitutes a taking under the Fifth Amendment. *Id.* at 62. Respondent did not seek judicial review of these orders.

Respondent also had a dispute with BLM over his Special Recreational Use Permit. Respondent had taken over Nelson's SRP, which had a five-year term, but after respondent had committed numerous violations of the SRP's terms, BLM suspended the SRP in 1995 and reduced it to a one-year term, a form of probation. In June 1999, BLM denied respondent's

application to renew the SRP, citing the earlier suspension, the blading incident described above, ten grazing trespass notices respondent had received, some in conjunction with SRP activities, and his noncompliance with his grazing permit and allotment management plan on at least 20 occasions other than the trespasses. C.A. App. 70-76. The IBLA upheld the cancellation of the SRP, holding that "the entire record and the pattern of violations represented by the repeated notices he has received since receiving the first SRP in 1994 provide more than a reasonable factual basis for BLM's decision in this case not to renew the permit." *Id.* at 75. Respondent did not seek judicial review of that order.

3. In August 1998, respondent brought an action against petitioners under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming various constitutional violations, and under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, charging the BLM employees with attempting to extort a reciprocal easement from him. Petitioners moved to dismiss for failure to state a claim and based on qualified immunity. The district court granted that motion. It dismissed the RICO claims on the ground that the plaintiff had not sufficiently pleaded damages, and the *Bivens* claim on the ground that the availability of judicial review under the APA, 5 U.S.C. 701 *et seq.*, and the Federal Tort Claims Act (FTCA) precluded a *Bivens* cause of action in this context.

The court of appeals reversed and remanded. App., *infra*, 76a-84a (*Robbins I*). First, it held that at the pleading stage, RICO plaintiffs could make general allegations of damages. *Id.* at 78a-80a. Second, the court held that respondent's *Bivens* claim was precluded to the extent that it was based on final agency action. However, because the APA does not provide a remedy "for constitutional violations committed by individual federal employees unrelated to final agency action," the court held that respondent's allegations of miscon-

duct "unrelated to any final agency action" are "properly within the scope of a *Bivens* claim." *Id.* at 81a-82a. The court further held that "the existence of a potential FTCA claim is an insufficient basis for the district court to preclude [respondent's] *Bivens* claim." *Id.* at 83a.

Following a remand, respondent filed a second amended complaint, and petitioners moved to dismiss on the ground of qualified immunity. The district court granted the motion in part and denied it in part. App., *infra*, 49a-75a (*Robbins II*). The court held that respondent had alleged violations of clearly established law under the Hobbs Act, 18 U.S.C. 1951 (extortion), and under Wyoming law of blackmail. App., *infra*, 60a-61a. The court also held that respondent had alleged the violation of a clearly established right not to be retaliated against for the exercise of a Fifth Amendment to exclude others from his property. *Id.* at 72a-74a. But the court dismissed claims under the Fourth Amendment for malicious prosecution, *id.* at 62a-67a, and under the Fifth Amendment for procedural and substantive due process, *id.* at 67a-72a.

Limited discovery ensued. Petitioners then moved for summary judgment based on qualified immunity. Respondent also filed a third amended complaint, mostly reiterating the allegations of the second amended complaint and adding petitioner David Wallace as a defendant. The district court again denied petitioners' motion. Pet. App. 27a-48a (*Robbins III*). Based on its earlier decision, the court held that both the law underlying the RICO claim and the constitutional right at issue in the *Bivens* claim were clearly established and that qualified immunity had to be denied. *Id.* at 33a-39a. The court declined to reconsider its holding based on the materials submitted on summary judgment. *Id.* at 39a-48a.

4. The court of appeals affirmed. App., *infra*, 1a-26a.

The court began with respondent's *Bivens* claim that petitioners' "conduct violated his right to be free from retaliation

for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 10a-11a. The court rejected petitioners' threshold contention that respondent's *Bivens* claim is completely precluded by the APA. It explained that, in the prior appeal in this case, the court had held that "only [respondent's] allegations involving individual action unrelated to final agency action are permitted under *Bivens*." *Id.* at 25a. But the court concluded that petitioners had failed to ask the district court on remand from the prior appeal to review respondent's complaint "to determine which allegations remain and which are precluded" under that ruling. *Ibid.* Accordingly, the court declined to determine which particular allegations were precluded under the reasoning of its prior decision.

As to the merits of the *Bivens* claim, the court first held that the Fifth Amendment not only protects a "right to exclude" the government from one's property by requiring just compensation, but protects a property owner from takings outside the eminent domain process. App., *infra*, 12a-13a. The court explained that, "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a; see *id.* at 14a ("[Respondent] has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power."). In addition, according to the court, that "right to exclude others from one's property" outside the eminent domain process was clearly established. *Id.* at 15a.

The court further held that the Fifth Amendment "right to exclude" includes an anti-retaliation prohibition. The court explained that, "[b]ecause retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is

meaningful." App., *infra*, 15a. Although the court recognized that there was no precedent supporting a right against retaliation for the exercise of a Fifth Amendment right, it held that *DeLoach* v. *Bevers*, 922 F.2d 618 (10th Cir. 1990), a First Amendment case, "requires only that the right retaliated against be clearly established." App., *infra*, 16a. The court, therefore, held that petitioners were not entitled to qualified immunity on the Fifth Amendment retaliation claim.

The court also denied qualified immunity on the RICO claim. The court rejected petitioners' argument that the predicate act for extortion under color of official right under the Hobbs Act required a showing that the alleged conduct was independently wrongful. Although the court did not question that petitioners had regulatory authority to take each of the allegedly retaliatory acts, it concluded that "if [petitioners] engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." App., *infra*, 18a. The court also concluded that respondent had stated a RICO predicate act under the Wyoming law concerning blackmail. *Id.* at 24a. The court further held that, viewed at the "proper level of generality," respondent had alleged a violation of "clearly established statutory rights." *Id.* at 21a-22a.

5. Petitioners filed a petition for rehearing en banc, but the petition was denied on March 14, 2006. App., *infra*, 85a-86a.

## REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case holds that government officials may be subject to damages actions under RICO and *Bivens* for engaging in regulatory activity that the court assumed to be within the employees' duties and without the purpose of personal gain. The basic regulatory activity giving rise to this case—attempting to secure a reciprocal

right-of-way over private land intermingled with public lands—is one in which federal officials routinely engage in managing federal lands. The court of appeals' ruling takes the kind of give and take that is a standard aspect of negotiations between property owners with interlocking and interdependent parcels and transforms it into a constitutional tort. Because that kind of give and take is authorized by regulation, the decision is of critical importance to the government's land management responsibilities. But the decision's analytical reach is even greater because it potentially transforms lawful regulatory activity into *racketeering* activity under civil RICO whenever a plaintiff alleges that a government official exercised such authority with an intent to extort.

The court of appeals' far-reaching decision in this case directly conflicts in several different respects with the precedents of this Court and other circuits. The court's holding that a RICO predicate act of extortion under color of official right may be shown by merely alleging that government officials had an extortionate intent to obtain property for the benefit *of the government*—with no allegation that they had any personal interest in the property or acted outside the scope of their lawful regulatory duties—conflicts with a decision of the Eighth Circuit. *Sinclair* v. *Hawke*, 314 F.3d 934 (2003). Indeed, the Eighth Circuit found the proposition embraced by the court of appeals here to be "ludicrous on its face," and explained that "regulators do not become racketeers by acting like aggressive regulators." *Id.* at 943.

The court of appeals' decision to allow respondent's *Bivens* claim to proceed is novel and unfounded in at least three different respects. First, as a threshold matter, the court's ruling that the availability of APA review for all the major incidents in this context did not preclude respondent's *Bivens* action conflicts with the decisions of at least three other circuits, which have held that the APA's remedial scheme precludes a *Bivens* claim challenging administrative

action, "even when the administrative remedy does not provide complete relief." *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). Second, the court of appeals' ruling that respondent had a Fifth Amendment right to exclude the government from his property *except through the eminent domain process* conflicts with decisions of this Court recognizing that the Fifth Amendment does not entitle individuals to prevent the government from taking their property (but instead affords them a right to just compensation when a taking occurs), and that takings may occur outside the eminent domain process. Third, the court of appeals' ruling that the Fifth Amendment confers a right against retaliation is, by the court's own admission, the first decision of its kind. App., *infra*, 14a-16a.

The last two aspects of the court of appeals' Fifth Amendment analysis, when combined, transform the normal give and take between owners of intermingled parcels of private and public lands into unconstitutional state action. There is nothing sinister about the government seeking an easement from an adjoining property owner "outside the eminent domain process," and conditioning an easement over public land on a reciprocal easement over interlocking parcels of private land is not unconstitutional retaliation. The court of appeals' contrary decision effectively creates a constitutional impediment to responsible federal land management.

The court of appeals' denial of qualified immunity in the context of this first-of-its-kind decision is even more problematic. This Court has made clear that, even when a plaintiff has properly alleged the violation of a constitutional or statutory right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). At a minimum, the court of appeals failed to identify the violation of any *clearly established* right. This Court has

repeatedly stressed the importance of the qualified immunity doctrine to ensure that government officials are not inhibited in the exercise of important government responsibilities. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). The court of appeals' decision completely disregards bedrock immunity principles and warrants this Court's review.

### A. The Court of Appeals' RICO Holding Conflicts With A Decision Of The Eighth Circuit And Would Expose Public Officials To Personal Liability, Including Treble Damages, For Taking Lawful Regulatory Acts

The court of appeals held that a RICO predicate act of extortion under color of official right may be shown by a mere allegation that government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government, with no allegation that they had any personal interest in the property. That holding directly conflicts both with this Court's case law on extortion and *Sinclair* v. *Hawke*, 314 F.3d 934 (8th Cir. 2003).

1. Extortion under color of official right requires a showing that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992); see also *Scheidler* v. *NOW*, 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office."). Moreover, there must be a *quid pro quo* for the payment—*i.e.*, an understanding that the payment is in exchange for official acts. *McCormick* v. *United States*, 500 U.S. 257, 273 (1991).

It is not always necessary that the defendant himself benefit from the extortion; there may be extortion if the payments are made to a third party, or entity, at the direction of the defendant. Cf. *United States* v. *Clemente*, 640 F.2d 1069,

1079-1080 (2d Cir.), cert. denied, 454 U.S. 820 (1981) (aiding payment of kickbacks to another). But no precedent holds that a government official may extort property solely by attempting to facilitate transfer of the property *to the government itself* pursuant to entirely lawful procedures. There is a critical difference between an overzealous regulator and an extortionist; an alleged extortionist must attempt to "obtain" the victim's property. *Scheidler*, 537 U.S. at 404. This requirement reflects the reality that, if the government demands property to which it is not legally entitled, the owner of that property may block the government in court or seek judicial review of the government's action. But just as the government itself cannot be guilty of extortion, neither can the government's agent who makes the demand *on behalf of the government*, unless he or some other non-governmental party is to receive a personal benefit as a result.

2. The court of appeals did not dispute that petitioners' actions were within their regulatory authority, but it nevertheless held that the allegation of an intent to "extort" made their conduct actionable. App., *infra*, 18a (If petitioners "engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO."). An intent to "extort" is not possible when one assumes that government action is authorized and there is no allegation of personal benefit. That is particularly true in this context, where, as authorized by regulation, the government seeks to obtain reciprocal treatment of interlocking parcels.

While respondent has alleged an elaborate conspiracy by petitioners to obtain a reciprocal right-of-way on behalf of the government, he does not allege that any of them had a personal stake in that goal. Respondent's theory is that petitioners were trying to "extort" from him a reciprocal easement for the benefit of the government. He makes no allegation that petitioners had a *personal* interest in obtaining such an

easement. Moreover, the government was acting like a typical property owner in seeking through lawful means to encourage another owner to agree to a reciprocal property right. The government at times may have more means at its disposal in negotiating such an arrangement than the typical private property owner, and that may justify giving the private property owner greater recourse against the government to avoid overreaching, such as the availability of APA review. But there is no basis for converting a legitimate effort to obtain reciprocity for the government into RICO extortion or, as discussed below, a *Bivens* claim.

3. The court of appeals' decision holding that such conduct may subject government officials to RICO liability directly conflicts with the Eighth Circuit's decision in *Sinclair* v. *Hawke*, *supra*. In *Sinclair*, the Office of the Comptroller of the Currency took escalating regulatory actions against a bank, eventually threatening to issue a safety and soundness order that would have hampered its lending efforts and later issuing a notice of charges against the bank. The Eighth Circuit rejected the bank's civil RICO claim, explaining that "federal employees who take regulatory action consistent with their statutory powers [do not] engage in a 'pattern of racketeering activity' if those actions are adverse" to a particular business; "regulators do not become racketeers by acting like aggressive regulators." 314 F.3d at 943-944. Indeed, the Eighth Circuit went so far as to observe that the contrary proposition—the basic theory adopted by the decision below—is "ludicrous on its face." *Id.* at 943.

The court of appeals attempted to distinguish *Sinclair* on the ground that it involved no disputed issue of fact as to the regulators' extortionate intent. App., *infra*, 21a ("In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from [respondent]."). But insisting on a recip-

rocal right-of-way was part of the regulatory regime that petitioners were enforcing. And the court was mistaken in speaking of an extortionate intent, because there is no allegation in this case that petitioners sought any *personal benefit* from the property. Instead, respondent fully admits petitioners were trying to obtain the interest in property for the government, which does not rise to an extortionate intent.

The court of appeals' RICO ruling has potentially severe consequences for government officials who have direct regulatory contact with private citizens. Under the decision below, BLM and Forest Service officials like petitioners who regulate intermingled public lands; bank regulators like the defendants in *Sinclair*; and potentially countless other regulatory officers may be subject to extortion charges under RICO, along with the prospect of personal liability and treble damages, for taking tough regulatory actions, even if those actions are authorized by law and the officials have no personal interest in the property they have sought on behalf of the government. There, of course, need to be checks (such as the APA) against unauthorized or excessive regulators, but the prospect of RICO liability based on a mere allegation of extortionate intent is not an appropriate check and threatens to chill appropriate and vital regulatory actions.

**B. The Court Of Appeals' Holding That Respondent's Retaliation Claim Based On His Alleged Fifth Amendment "Right To Exclude" Others From His Property States A Claim Under *Bivens* Conflicts With Precedents Of This Court And Other Courts Of Appeals.**

The court of appeals' conclusion that respondent's *Bivens* claim should proceed to trial also warrants review. First, the court erroneously rejected petitioners' threshold contention that the *Bivens* remedy was completely precluded in light of the administrative review mechanism established by the APA. Second, the court erroneously embraced—as "clearly estab-

lished," no less—respondent's novel claim of a constitutional right to be free from retaliation for the exercise of a Fifth Amendment "right to exclude" the government from one's property. Those rulings also conflict with the decisions of this Court and other courts of appeals.

1. The court of appeals erred in holding that respondent's Fifth Amendment retaliation claim was actionable under *Bivens*. In *Bivens*, this Court inferred a private action for damages against federal law-enforcement agents who violated a person's Fourth Amendment rights. But in recent years, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). That restraint corresponds with the Court's "retreat[]" from its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3; see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Malesko*, 534 U.S. at 69 (quoting *Chilicky*, 487 U.S. at 421-422). To the contrary, when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has declined to create additional remedies under *Bivens*. *Chilicky*, 487 U.S. at 423. Thus, for example, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for certain personnel actions against probationary employees, *id* at 385 n.28.

In the initial appeal in this case, petitioners argued that the remedial mechanism established by the APA—which permits judicial review of final agency action that is allegedly contrary to a "constitutional right, power, privilege, or immunity," 5 U.S.C. 706(2)(B)—precluded respondent's *Bivens* claim. The court of appeals rejected that argument in part, reasoning that *Bivens* was precluded only to the extent that respondent challenged final agency action. Thus, under the court of appeals' initial ruling—which the court reaffirmed below, App., *infra*, 25a-26a—*Bivens* is available with respect to allegations that are "unrelated to final agency action." *Id.* at 82a; see *id.* at 81a-82a. Because "[n]ot all of [respondent's] allegations serving as a basis for his *Bivens* claim involve individual action leading to final agency decisions reviewable pursuant to the APA," the court held that respondent's *Bivens* claim was entitled to proceed. *Id.* at 82a.

That ruling conflicts with the decisions of the other circuits that have addressed the availability of *Bivens* in this context. Those circuits have recognized that the APA precludes the creation of a *Bivens* remedy, even where the scope of the two remedies may not be entirely coextensive. As the Eighth Circuit has explained: "When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the [APA] is sufficient to preclude a *Bivens* action." *Sinclair* v. *Hawke*, 314 F.3d at 940; see *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). That is true, the Eighth Circuit underscored, "even when the administrative remedy does not provide complete relief." *Nebraska Beef*, 398 F.3d at 1084. The Eleventh and Ninth Circuits have reached the same conclusion. See *Miller* v. *United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("the existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action"); *Moore* v. *Glickman*, 113 F.3d 988, 994 (9th

Cir. 1997); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146, 1148 & n.4 (9th Cir. 1991), cert. denied, 506 U.S. 816 (1992).

Respondent's complaint states only a single count of retaliation allegedly in violation of the Fifth Amendment. That claim ultimately is based solely on respondent's refusal to grant the government a reciprocal right-of-way, which BLM regulations expressly granted petitioners the regulatory authority to pursue. Thus, the fact that the APA provides no remedy for certain conduct—*i.e.*, that involving acts "unrelated to final agency action," App., *infra*, 82a—does not mean that a *Bivens* action may be inferred with respect to that conduct. Indeed, inferring such a *Bivens* action would be inconsistent with Congress's decision to *shield* non-final agency action from review under the APA. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Given that the major incidents that give rise to respondent's claim involve final agency action, the court of appeals' rule has the perverse consequence of inferring a constitutional action only as to those incidents that Congress considered too trivial or too tentative for judicial review in the APA context. The APA establishes what Congress deemed to be the appropriate mechanism for judicial review in this context. The court of appeals erred in supplanting that scheme with *Bivens*.

Moreover, this Court's decisions in *Bush* and *Chilicky* prevent the courts from creating a *Bivens* remedy simply because a particular plaintiff has *no* relief at all under a comprehensive statutory review mechanism. See *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 425; see also, *e.g.*, *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) ("In the field of federal employment, even if no remedy at all has been provided by the [Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111], courts will not create a *Bivens* remedy.") (citing cases); *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) ("the CSRA precludes even those *Bivens* claims for which the act prescribes no alternative remedy"); *Volk* v. *Hobson*, 866 F.2d

1398, 1402 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989) ("The lesson of *Bush* is not that courts should assess the efficacy of existing remedies, but that they should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme."); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (interpreting *Chilicky* to require preclusion when the plaintiff has "no remedy whatsoever" in the remedial scheme).

The APA establishes a comprehensive remedial mechanism governing challenges to administrative action, including to the type of administrative challenge underlying this case. See p. 18, *supra*. The fact that the APA does not confer a remedy with respect to every one of respondent's allegations underlying his Fifth Amendment claim does not provide a basis for inferring a cause of action under *Bivens*. More fundamentally, extending *Bivens* to this context would radically expand *Bivens* in direct contravention of this Court's precedents and principles of judicial restraint. See *Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

The court of appeals rejected petitioners' argument that respondent's *Bivens* claim is precluded in its entirety because of the availability of judicial review under the APA in the prior appeal and reaffirmed that ruling in the decision below. See App., *infra*, 25a-26a.[1] Because that threshold argument is inextricably intertwined with petitioners' defense of qualified immunity as to the *Bivens* claim, it was properly before

[1] In their brief below, petitioners argued not only that particular allegations should be dismissed under the reasoning of the court of appeals' initial ruling, but also that the entire *Bivens* claim was precluded. See Pet. C.A. Br. 21 ("Since the decision to deny [respondent] a right-of-way absent easement is subject to administrative and judicial review under the APA, [respondent's] *Bivens* action should, strictly speaking, be precluded as to *all* of the allegations.").

the court of appeals in the interlocutory appeals of the district court's qualified immunity rulings and is properly before this Court. See, *e.g.*, *Hartman* v. *Moore*, 126 S. Ct. 1695, 1702 n.5 (2006) (holding that Court had jurisdiction in qualified immunity appeal to address elements of *Bivens* causes of action for malicious prosecution and retaliatory prosecution because the question of the elements of the *Bivens* claim was "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on interlocutory appeal" concerning qualified immunity).

2. This Court's review is also warranted to address the denial of qualified immunity on the ground that respondent adequately alleged that "[petitioners'] conduct violated his right to be free from retaliation for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 11a.

a. It is common ground that individuals possess a "right to exclude" others—including the government—from their property. This Court has held that such right to exclude was "[o]ne of the main rights attaching to property" found at common law, see *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978), and that the right's contemporary source is state law. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Respondent's *Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment. App., *infra*, 10a-16a.[2] The

[2] While the right to exclude may be connected at a general level with the right to be free from unreasonable searches and seizures under the Fourth Amendment, *Roth*, 403 U.S. at 577; see App., *infra*, 13a, this case does not involve any allegations of an improper search or seizure. A malicious

Fifth Amendment, however, protects the right to exclude provided by state law vis-à-vis the government *only* by way of the Takings Clause's guarantee of just compensation. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). The right to exclude thus is not absolute; it is qualified by the government's eminent domain authority. Equally important, the right to exclude is not a right to exclude without consequence. With interlocking or interdependent parcels of land, exercising the right to exclude and denying an easement can be expected to result in the denial of a reciprocal easement. When the government is one of the property owners, its efforts to maximize both owners' interest in their property by negotiating reciprocal easements do not infringe the right to exclude.

Respondent does not allege any taking in violation of the Fifth Amendment, and thus has not sought just compensation for any taking.[3] Rather, his basic claim is that the BLM *tried* to take his property by allegedly pressuring him to give the government a reciprocal right-of-way over his property. Far from alleging that the government has taken his property, respondent's Fifth Amendment *Bivens* claim is predicated on his assertions that he is being denied the use of *public* lands (*i.e.*, maintenance of the federal portion of the road and grazing privileges on federal lands) because he will not consent to a reciprocal right-of-way over his portion of the road.

The court of appeals held that "[respondent] has a Fifth Amendment right to *prevent* BLM from taking his property when BLM is not exercising its eminent domain power."

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prosecution claim founded on the Fourth Amendment was dismissed by the district court. App., *infra*, 67a. That claim, however, is not before the Court in this action.

[3] Respondent made a takings claim in one of the administrative actions that he filed against the BLM. The IBLA rejected that claim and respondent did not seek judicial review of that order. See *High Island Ranch*, No. 98-180R (IBLA May 20, 1999), slip op. 5 (C.A. App. 62), discussed p. 6, *supra*.

App., *infra*, 14a (emphasis added). But this Court has made clear both that individuals have no Fifth Amendment right to *prevent* a taking (only a right to just compensation to remedy the taking), *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016, and that takings may occur outside of the eminent-domain process, see *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting that the Court has recognized since 1922 "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment").

The court of appeals also ignored the statutory remedy for takings. Respondent may not sue individual government employees for a taking (or for an attempted taking); rather, his sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act once a taking has occurred. See 28 U.S.C. 1491. That necessarily follows from the fact that the Takings Clause does not prohibit the government from taking property but simply requires the government to pay just compensation if it does. Thus, if the government eventually provides just compensation for a taking, the taking itself does not violate the Fifth Amendment. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); see *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (purpose of the Fifth Amendment is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); *id.* at 314 (Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

*Kaiser Aetna*—the principal case on which the court of appeals relied, App., *infra*, 12a-14a—is not to the contrary.

That decision makes clear—in language omitted by the court of appeals—that the "right to exclude" *may* be taken so long as just compensation is paid. 444 U.S. at 179-180 (footnote omitted and emphasis added) ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take *without compensation*") (emphasis added). Respondent, however, does not claim any taking and thus has never pursued the statutory remedy for an alleged taking. Accordingly, any takings claim would be premature in any event. *Williamson County*, 473 U.S. at 195 ("taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491"); accord *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Especially in the context of interlocking properties, the careful scheme of the Takings Clause cannot be replaced by individual officer liability when the negotiation process for a reciprocal easement breaks down.

b. The court of appeals further erred in holding that the Fifth Amendment confers a right to sue for money damages for retaliation for the exercise of alleged Fifth Amendment rights. To begin with, respondent cannot claim retaliation for the exercise of his Fifth Amendment rights, when he has not exercised the right protected by the Fifth Amendment—the right to receive just compensation for any taking. His Fifth Amendment retaliation claims fails for that reason alone. In any event, the court of appeals erred in holding that the Fifth Amendment confers its own anti-retaliation right.

The First Amendment is the only context in which this Court has recognized a constitutional anti-retaliation right. But the Court has long showed heightened sensitivity to concerns about chilling protected activity in the First Amendment context. See, *e.g.*, *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile interests, and a person who contemplates protected activity might be dis-

couraged by the *in terrorem* effect of the statute."); see also *Hartman* v. *Moore*, 126 S. Ct. 1695, 1701 (2006) ("as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out") (citation omitted); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'") (brackets in original).

The Court's focus on the First Amendment in creating a remedy for retaliation is fully in keeping with the Court's special solicitude for First Amendment rights. Indeed, the Court has developed a variety of other legal doctrines that apply in the First Amendment context alone. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003) (overbreadth); *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive alternative); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (prior restraints); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (third-party standing); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000) (independent review of fact finding).

Neither this Court nor any circuit court other than the court below has recognized an anti-retaliation right outside the First Amendment context. Indeed, the decision below relied on *dictum* in a First Amendment case (*DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)) in holding that respondent possessed a right against retaliation for the exercise of his Fifth Amendment rights. App., *infra*, 15a-16a.[4]

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[4] While *DeLoach* referred in general terms to the exercise of "a constitutionally protected right," the claim there was that the police had arrested the plaintiff in retaliation for her right to retain counsel, and the court predicated its holding on the First Amendment: "Bevers contends that DeLoach had no Sixth Amendment right to counsel when she was merely a suspect in the

Nor do the same concerns exist in the Fifth Amendment context about chilling protected activity. Unlike the First Amendment, the Fifth Amendment was not intended to encourage a particular type of citizen activity that could be chilled if not robustly protected. Moreover, unlike the First Amendment context, the Takings Clause, with its guarantee of a remedy, assumes a degree of permissible interference with property rights. Nor is the Takings Clause primarily an absolute prohibition of government action, but rather a means of ensuring the remedy of just compensation. And especially in the context of interlocking properties and reciprocal easements, there is a broad scope of legitimate give and take that makes liability for going too far in retaliating for failing to grant a reciprocal easement particularly troubling. The ability to obtain just compensation for any taking is itself a robust incentive for invoking one's Fifth Amendment rights. The court of appeals' unprecedented creation of a civil damages remedy for retaliation in the Fifth Amendment context accordingly warrants this Court's review.[5]

### C. The Court of Appeals' Qualified Immunity Analysis Is Fundamentally Flawed And At Odds With This Court's Teachings

At a minimum, the court of appeals erred in holding that the foregoing RICO and Fifth Amendment rights were *clearly established*. Even when a plaintiff has properly alleged the violation of a constitutional right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was

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criminal investigation. The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech." 922 F.2d at 620.

[5] Of course, retaliation for First Amendment protected speech could take the form of interference with the speaker's property rights (including interferences short of a taking), but that is not the nature of respondent's claim.

unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). Moreover, the determination whether a right was "clearly established"—"it is vital to note"— "must be undertaken in light of the specific context of the case, not as a broad proposition." *Ibid.*; see *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (to determine whether a right is clearly established, it must be "defined at the appropriate level of specificity"). That requirement "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier*, 533 U.S. at 201.

As this Court explained in *Wilson* v. *Layne*, *supra*, a right is clearly established if "in the light of preexisting law the unlawfulness [is] apparent." 526 U.S. at 615. That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. at 202; see *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (it must be clear to a reasonable official "that his conduct was unlawful in the situation he confronted"); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what *he* is doing violates that right.") (emphasis added).

Petitioners in this case had no reason to believe that they were violating any clearly established right in attempting to obtain a reciprocal right-of-way from respondent through the exercise of their lawful regulatory authority. No previous decision of any court suggests that petitioners' conduct would violate any statutory or constitutional right. Indeed, the court of appeals itself acknowledged that "no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights." App., *infra*, 16a. That admission, alone, entitles petitioners to qualified immunity on respondent's novel Fifth Amendment retali-

ation claim. As discussed above, the court of appeals' RICO extortion ruling is similarly unfounded. Particularly given the potential breadth of the court's RICO and Fifth Amendment rulings and its sharp departure from existing precedent, the court of appeals' ruling that petitioners are not entitled to qualified immunity warrants further review.

### D. The Court Of Appeals' Decision Could Severely Disrupt Important Government Functions And Subject Government Employees To Threat Of Civil Damages Actions Simply For Performing Their Lawful Regulatory Duties

The court of appeals' decision in this case could severely disrupt legitimate regulatory activity and, in particular, land management functions. In the American West, millions of acres of publicly owned lands are intermingled in a patchwork fashion with private lands. Indeed, the patchwork nature of western land forms a unique part of our history. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979). At the same time, however, the intermingled nature of these lands raises a host of property law issues, including questions about reciprocal access and rights-of-way between adjoining landowners.

For example, BLM has the authority to require any applicant for a federal right-of-way across public lands to provide the United States with a reciprocal right of access. See 43 C.F.R. 2901.1-2. In addition, like private landowners, BLM has the authority to deny an application for a federal right-of-way where BLM determines that a reciprocal right-of-way is in the public interest, and the applicant refuses to agree to such reciprocal access. BLM has without incident negotiated thousands of such reciprocal rights-of-way across private lands intermingled with public lands. Such reciprocal rights are a longstanding and indispensable feature of the federal land management scheme given the patchwork nature of public and private lands in large tracts of the West. Reciprocal rights are vital to the government's ability to maintain public

lands and facilities, such as the South Fork, Owl Creek Road at issue in this case, engage in resource and wildlife management, and conduct other important government functions.

In addition, the BLM administers over 21,000 grazing permits nationwide, including nearly 3500 permits in Wyoming alone. The great majority of those permits involve circumstances similar to that involved in this case where private land is intermixed with federal lands. BLM is statutorily required to administer such public lands under, *inter alia*, the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701. Where a grazing permit involves intermingled lands, BLM's authority to enter private land to the extent necessary to administer the terms and conditions of the permit is an implied condition of the permit. See p. 3, *supra*.

The court of appeals' decision in this case subjects federal officials to damages actions and threat of personal liability for carrying out their regulatory duties in attempting to secure reciprocal rights-of-way. The very nature of reciprocal easements means that the refusal to agree to a mutually beneficial easement will result in a denial of a one-sided easement. Insistence on reciprocity cannot be viewed as unconstitutional retaliation without undermining the government's ability to deal with its interlocking parcels. What is more, the decision subjects such employees to the threat of civil RICO damages if a jury finds that they had an "extortionate" intent in seeking to secure reciprocal rights through the exercise of lawful regulatory authority. The decision below therefore could severely disrupt the administration of critical land management responsibilities by the government.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2006

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 04-8016

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

*v.*

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICHAEL MILLER, GENE LEONE, DAVID WALLACE, DEFENDANTS-APPELLANTS

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PACIFIC LEGAL FOUNDATION, NEW MEXICO CATTLE GROWERS ASSOCIATION, WASHINGTON; FARM BUREAU, IDAHO FARM BUREAU, IDAHO COUNTY FARM BUREAU, OWYHEE COUNTY FARM BUREAU, WASHINGTON STATE GRANGE, AND NEW MEXICO FEDERAL LANDS COUNCIL, AMICI CURIAE

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Jan. 10, 2006

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Before: KELLY, HENRY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

## I. Introduction

Plaintiff-Appellee Harvey Frank Robbins filed suit pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed. 2d 619 (1971). Robbins al-

leges employees of the Bureau of Land Management ("BLM"), including Defendants-Appellants Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, Gene Leone, and David Wallace, attempted to extort a right-of-way across Robbins' property in violation of RICO and the Fifth Amendment. Defendants filed a motion for summary judgment on qualified immunity. The district court denied the motion concluding, *inter alia*, that Robbins had sufficiently alleged violations of his clearly established rights under RICO and the Fifth Amendment. Defendants appealed. This court has jurisdiction pursuant to 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L.Ed. 2d 411 (1985). Because the right to be free from retaliation for the exercise of Fifth Amendment rights is clearly established and Defendants' alleged wrongful use of otherwise lawful authority to obtain a right-of-way from Robbins violates clearly established law under the Hobbs Act and Wyo. Stat. Ann. § 6-2-402, we **affirm**.

## II. Background

Robbins owns High Island Ranch in Hot Springs County, Wyoming where he engages in cattle ranching and operates a commercial guest ranch. Robbins purchased the ranch from George Nelson who had granted to BLM a non-exclusive access easement along a road on the ranch. BLM failed to record the easement, however, and Robbins had no notice of it when he purchased and recorded his interest in the ranch. Thus, under Wyoming's recording statute, Robbins took ownership of the ranch unencumbered by the easement. Robbins also had various BLM preference rights, livestock grazing permits, and a special-recreation use permit allowing him to use federal lands adjacent to his property.

When BLM learned its easement had been extinguished, it contacted Robbins to discuss obtaining a right-of-way

across the ranch. Robbins refused. Robbins alleges that in retaliation for his refusal to grant the right-of-way, Defendants attempted to extort the right-of-way from him. Specifically, Robbins alleges Defendants refused to maintain the road providing access to his property; threatened to cancel, and then cancelled, his right-of-way across federal lands; stated they would "bury Frank Robbins"; cancelled his special recreation use permit and grazing privileges; brought unfounded criminal charges against him; trespassed on his property; and interfered with his guest cattle drives.

Robbins brought claims pursuant to *Bivens* and RICO. Defendants filed a motion to dismiss both claims. The district court granted the motion, reasoning that Robbins had failed to adequately plead damages under RICO, and that the Administrative Procedures Act ("APA") and Federal Tort Claims Act ("FTCA") were alternative, equally effective remedies precluding Robbins' *Bivens* claim. This court reversed. *Robbins v. Wilkie*, 300 F.3d 1208 (10th Cir. 2002) (hereinafter *Robbins I*). We held that damages under RICO need not be pled with particularity. *Id.* at 1211. Moreover, the APA and FTCA did not preclude Robbins' *Bivens* claims because the APA does not provide a remedy when an official's intentional acts unrelated to agency action violate a party's constitutional rights, and the FTCA is a separate and distinct remedy from *Bivens*. *Id.* at 1212-13.

Subsequently, Defendants filed a second motion to dismiss on the grounds of qualified immunity. The district court granted the motion in part and denied it in part. *See generally Robbins v. Wilkie*, 252 F. Supp. 2d 1286 (D. Wyo. 2003). The district court determined Robbins had sufficiently alleged violations of his clearly established statutory rights under RICO and constitutional right to exclude others from his property under the Fifth Amendment. *Id.* at 1294-95, 1301-02. The district court dismissed Robbins' *Bivens* claims

for malicious prosecution under the Fourth Amendment and procedural and substantive due process under the Fifth and Fourteenth Amendments. *Id.* at 1298-1301. Defendants did not appeal this order.

Defendants then filed a motion for summary judgment on qualified immunity. Relevant to this appeal, Defendants argued there was not a clearly established constitutional right to exclude others from one's property, and that they could not be held liable under RICO for actions authorized by BLM regulations because those actions are not "wrongful." The district court denied summary judgment on both grounds. With regard to Robbins' *Bivens* claim, the district court concluded Robbins had a clearly established right to be free from retaliation for exercising his right to exclude others from his property under the Fifth Amendment. Further, the district court determined Robbins had submitted sufficient evidence to support his complaint and Defendants failed to establish there were no issues of material fact. As to Robbins' RICO claim, the district court agreed that predicate acts under RICO must be otherwise wrongful to be actionable. The district court concluded, however, that actions taken by Defendants pursuant to BLM regulations can be wrongful if done with the intent of extorting. Because the district court determined there was an issue of material fact regarding Defendants' motive, summary judgment was denied.

## III. Discussion

### A. Jurisdiction

As a preliminary matter, this court ordered the parties to brief the appealability of the district court's order denying summary judgment. This court has appellate jurisdiction over "final decisions" of district courts. 28 U.S.C. § 1291. Under the "collateral order" doctrine, however, some district

court orders are considered "final" even though they are entered before a case has ended. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). One such collateral order permitting interlocutory appeal is a denial of qualified immunity. *Mitchell*, 472 U.S. at 530, 105 S. Ct. 2806. A denial of qualified immunity is only immediately appealable, however, to the extent the district court's decision turns on an abstract issue of law. *Id.* at 530, 105 S. Ct. 2806; *Johnson v. Jones*, 515 U.S. 304, 313-14, 317, 115 S. Ct. 2151, 132 L.Ed. 2d 238 (1995). Thus, an appellate court may examine on interlocutory appeal the purely legal question of whether the facts alleged by plaintiff support a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 528 n. 9, 105 S. Ct. 2806. An appellate court may not, however, review questions of evidentiary sufficiency on interlocutory appeal. Therefore, a portion of a district court order denying qualified immunity is not immediately appealable insofar as the order determines plaintiff's claims are supported by sufficient evidence in the record or disputed issues of material fact exist which preclude summary judgment. *Johnson*, 515 U.S. at 313, 115 S. Ct. 2151; *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997).

The district court's denial of qualified immunity in the present case turned on both issues of abstract law and evidentiary sufficiency. The district court determined Robbins had submitted sufficient evidence to support his *Bivens* claim and there was a disputed issue of material fact regarding Defendants' motive precluding summary judgment on Robbins' RICO claim. We do not have jurisdiction to examine these determinations of evidentiary sufficiency on interlocutory appeal. *Johnson*, 515 U.S. at 319-20, 115 S. Ct. 2151; Foote, 118 F.3d at 1422. The district court, however, also concluded Robbins sufficiently alleged a violation of his clearly established Fifth Amendment right, and the wrong-

ful use of otherwise lawful authority violates clearly established law under RICO. These abstract issues of law regarding whether a particular law was clearly established are immediately appealable. *Mitchell*, 472 U.S. at 530, 105 S. Ct. 2806; *Foote*, 118 F.3d at 1422.

Robbins also contends Defendants' failure to appeal the district court's order denying dismissal on qualified immunity precludes Defendants from appealing an order denying summary judgment on the same qualified immunity issues. Robbins reasons that allowing Defendants to appeal a second denial of qualified immunity after failing to appeal the first denial would be an end-run around the timeliness requirements of the notice of appeal provision of the Federal Rules of Appellate Procedure. Fed. R. App. P. 4(a)(1)(B).

Although this issue is one of first impression in this circuit, the Supreme Court and several other circuits have addressed the issue. In *Behrens v. Pelletier*, defendant filed a motion to dismiss on qualified immunity, which the district court denied after dismissing some of plaintiff's claims as time-barred. 516 U.S. 299, 303, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). Defendant appealed the denial of qualified immunity and the Ninth Circuit affirmed. *Id.* at 303-04, 116 S. Ct. 834. Subsequently, the district court reversed course on the statute-of-limitations question, concluding none of the plaintiff's claims were time-barred. *Id.* at 304, 116 S. Ct. 834. In response, the defendant filed a motion for summary judgment on qualified immunity, including the claims that were previously dismissed as time-barred. *Id.* The district court denied this motion and the Ninth Circuit dismissed defendant's appeal for lack of jurisdiction. *Id.* at 304-05, 116 S. Ct. 834.

The Supreme Court reversed, concluding there was jurisdiction over the second interlocutory appeal. *Id.* at 309-311, 116 S. Ct. 834. In so doing, the Court surmised that resolu-

tion of the immunity question may "require more than one judiciously timed appeal." *Id.* at 309, 116 S. Ct. 834 (quotation omitted). The Court reasoned that a defendant should be permitted to raise the qualified immunity defense at successive stages of litigation because different legal factors are relevant at various stages. *Id.* In particular, in a motion to dismiss, courts are limited to reviewing conduct alleged in the complaint, whereas in a motion for summary judgment, courts examine evidence accumulated during discovery. *Id.*

Several circuits have interpreted and applied *Behrens* in cases postured similar to the case before us. In *Grant v. City of Pittsburgh*, the Third Circuit held that a defendant's failure to appeal an order denying dismissal on qualified immunity does not preclude him from appealing a subsequent denial of the same legal arguments in a motion for summary judgment on qualified immunity. 98 F.3d 116, 120-21 (3d Cir. 1996). The court adopted the reasoning of *Behrens* by noting that although defendant's two motions raised the same legal theory, the second motion differed because it relied on matters developed during discovery. *Id.; see also Vega v. Miller*, 273 F.3d 460, 466 (2d Cir. 2001).

The Ninth Circuit went further in *Knox v. Southwest Airlines* by asserting jurisdiction over an appeal of an order denying a second motion for summary judgment after defendants failed to appeal the denial of their first summary judgment motion. 124 F.3d 1103, 1105-06 (9th Cir.1997). Defendants' first motion for summary judgment on qualified immunity was denied by the district court because of a disputed issue of fact. *Id.* at 1105. Defendants filed a second summary judgment motion making the same legal arguments, but providing additional evidence. *Id.* Citing *Behrens*, the Ninth Circuit asserted jurisdiction over defendants' second motion for summary judgment. *Id.* at 1106.

Robbins attempts to distinguish *Grant*, *Vega*, and *Knox* and instead argues that the District of Columbia Circuit's decision in *Kimberlin v. Quinlan* should guide our analysis. 199 F.3d 496 (D.C. Cir. 1999). In *Kimberlin*, Defendants moved for dismissal or summary judgment arguing, *inter alia*, that prison inmates do not have a clearly established First Amendment right to contact the press, and plaintiff failed to meet the heightened pleading standard applied to motive-based civil rights claims. *Id.* at 499. The district court denied the motion and defendants appealed only the heightened pleading standard ruling. *Id.* After discovery, defendants again moved for dismissal or summary judgment claiming the law was not clearly established. *Id.* The district court denied the motion concluding that its prior ruling that the law was clearly established was law of the case, and the appellate court affirmed. *Id.* at 499, 502.

Although *Kimberlin*, like *Grant* and *Vega*, is factually similar to the case presently before this court, Robbins' argument that *Kimberlin* supports the assertion we lack jurisdiction to consider Defendants' appeal is erroneous. The court in *Kimberlin* did not dispose of the case by asserting a lack of jurisdiction. Rather, it examined the merits by reviewing the propriety of the district court's application of the law of the case doctrine. *Id.* at 500-02. The court determined that the district court had correctly applied the law of the case doctrine because the same legal question had been decided in a prior stage of litigation and no prudential reasons existed for revisiting the prior decision. *Id.* In any event, the court proceeded to actually examine the underlying law of the case concluding that the First Amendment right at issue was "without doubt [ ] clearly established." *Id.* at 502.

Therefore, after *Behrens*, no circuit has held that an appellate court lacks jurisdiction over denial of a motion for

summary judgment when the motion raises the same legal arguments as a prior un-appealed motion to dismiss but relies on evidence developed during discovery.[1] Similarly, we decline to adopt such a rule. In carving out an exception to the finality requirement for appeals involving qualified immunity, the Supreme Court recognized that qualified immunity is both a right to avoid standing trial and a right to avoid the burdens of pretrial matters such as discovery. *Behrens*, 516 U.S. at 308, 116 S. Ct. 834. Requiring public officials to choose at which stage of litigation to raise a qualified immunity defense is inconsistent with these purposes. If public officials can avoid discovery by success on a motion to dismiss based on qualified immunity, they should not be prevented from filing the motion because of a fear that denial of the motion will prevent them from raising the defense again once their evidence is strengthened through discovery. Additionally, public officials should not be forced to appeal an order denying dismissal on qualified immunity to preserve appeal of a potential subsequent order denying summary judgment on the same issue. Such a rule would dramatically increase the number of interlocutory appeals at the dismissal stage. *Vega*, 273 F.3d at 465; *Grant*, 98 F.3d at 121. Thus, in the present case, Defendants' failure to appeal the district court's denial of dismissal on qualified immunity does not divest this court of jurisdiction to consider Defendants' current appeal because Defendants' summary judgment motion relies in part on evidence developed during discovery.

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[1] Prior to *Behrens*, two circuits dismissed appeals involving a second denial of qualified immunity because the second motion was substantially the same as the first. *Armstrong v. Tex. State Bd. of Barber Exam'rs*, 30 F.3d 643, 644 (5th Cir. 1994); *Taylor v. Carter*, 960 F.2d 763, 764 (8th Cir. 1992). *But see Grant v. City of Pittsburgh*, 98 F.3d 116, 120 (3d Cir.1996) (distinguishing *Armstrong* and *Taylor* in a case where defendant's second motion relied on material developed during discovery).

### B. Qualified Immunity

We review a district court's denial of summary judgment based on qualified immunity *de novo*. *Perez v. Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005). "Under the doctrine of qualified immunity, government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Douglas v. Dobbs*, 419 F.3d 1097, 1100 (10th Cir. 2005) (quotation omitted). When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). To overcome a qualified immunity defense, a plaintiff must first assert a violation of a constitutional or statutory right and then show that the right was clearly established. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996). A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). To show that a right is clearly established, a plaintiff does not have to produce a factually identical case. Rather, plaintiff may produce a Supreme Court or Tenth Circuit opinion on point, or demonstrate that the right is supported by the weight of authority from other courts. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). Once the plaintiff satisfies this initial two-part burden, the burden shifts to the defendant to show that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. *Id.*

#### 1. Fifth Amendment

Robbins' *Bivens* claim alleges Defendants' conduct violated his right to be free from retaliation for exercise of his

Fifth Amendment right to exclude others from his property. Robbins argues that the district court relied solely on the law of the case doctrine in denying Defendants' motion for summary judgment on his *Bivens* claim. The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). A district court's decision denying a defendant's motion to dismiss on qualified immunity is not law of the case for purposes of a subsequent motion for summary judgment on qualified immunity. Law of the case does not apply because a motion to dismiss and a motion for summary judgment do not raise the "same issues." Different "legally relevant factors" are under consideration on a motion to dismiss and a motion for summary judgment. *Behrens*, 516 U.S. at 309, 116 S. Ct. 834. On a motion to dismiss, a court examines the conduct alleged in the complaint to determine if plaintiff has alleged a violation of clearly established law, whereas, on a motion for summary judgment, a court examines the evidence gathered during discovery. *Id.* Thus, reliance on law of the case in dismissing Defendants' motion for summary judgment in this case would be erroneous.[2]

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[2] In *Kimberlin v. Quinlan*, the Court of Appeals for the District of Columbia upheld a district court's reliance on law of the case in dismissing defendant's motion to dismiss or for summary judgment on qualified immunity when the district court had previously determined on a prior motion to dismiss or for summary judgment that plaintiff had alleged a violation of clearly established law. 199 F.3d 496, 500-01 (D.C. Cir. 1999). *Kimberlin* is distinguishable from the present case, however, because, in *Kimberlin*, "the relevant facts [had not] changed" between the denial of dismissal and summary judgment. *Id.* at 501. Thus, the same facts and same issues were under consideration in both motions, making law of the case applicable. Here, the relevant facts are different. As the district court noted, Robbins' motion in opposition to summary judgment included

The district court, however, did not rely on law of the case. The district court did discuss law of the case in noting that it had already concluded in its denial of dismissal that Robbins alleged a violation of his clearly established Fifth Amendment rights. Nevertheless, in light of *Behrens*, the district court continued by examining the evidence gathered during discovery. The court determined Robbins' had provided ample evidence to support his allegation of a violation of clearly established law and Defendants failed to show the absence of an issue of material fact. Therefore, the district court actually examined the legally relevant factors involved in determining whether summary judgment was appropriate and did not merely rely on law of the case. Because the district court reached the question of whether Robbins met his burden of providing evidence supporting his allegation of a violation of clearly established law, we now review the district court's decision.

*a. Constitutional Right*

We first examine whether there is a Fifth Amendment right to exclude the government from one's private property and then inquire whether the Constitution proscribes retaliation for the exercise of that right. "The right to exclude [is] universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The right has long been recognized as one of the main rights attaching to property. *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (citing Blackstone Commentaries).

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248 exhibits supporting his claim that were not available at the motion to dismiss stage.

Defendants nevertheless argue Robbins has no constitutional right to exclude the government under the Fifth Amendment; rather, he is only entitled to just compensation if the government takes his property for public use. Because the government has not effected a taking in this case, Defendants contend Robbins has not alleged a constitutional violation. This argument is unpersuasive.

A property owner's right to exclude extends to private individuals as well as the government. *See United States v. Lyons*, 992 F.2d 1029, 1031 (10th Cir. 1993) (the expectations of privacy that are the cornerstone of Fourth Amendment protection against governmental search and seizure derive in part from the right to exclude others, including government officials, from one's property). "The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of [property] rights than if he sneaks in in the night wearing a burglar's mask." *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991). Defendants' assertion that BLM could have taken Robbins' property for public use after providing just compensation is correct. BLM, however, did not exercise or attempt to exercise its eminent domain power in this case. Instead, Robbins alleges, Defendants attempted to extort a right-of-way to avoid the requirement of just compensation. If the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause.

Defendants also argue that because BLM regulations permit access to and regulation of Robbins' property for certain purposes, Robbins has no right to exclude the BLM. The Supreme Court, however, rejected this argument in *Kaiser*, 44 U.S. 164, 100 S. Ct. 383. The government claimed a public right of access under the Rivers and Harbors Act to what was once a private pond. *Id.* at 168, 100 S. Ct. 383. The

owner had developed the pond into a private marina by dredging a channel and connecting the pond to a bay. *Id.* at 165- 67, 100 S. Ct. 383. The government claimed that these improvements converted the pond into "navigable water," and thus, by statute, the government was entitled to a public right of access. *Id.* at 168, 100 S. Ct. 383. The Court disagreed. It noted that while the marina may be subject to regulation by the Corps of Engineers as a navigable water, it did not follow that Congress could require a public right of access without invoking its eminent domain power and paying just compensation. *Id.* at 172-73, 100 S. Ct. 383. Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power.

This court has never explicitly recognized a constitutional right to be free from retaliation for the exercise of Fifth Amendment rights. Nevertheless, the right to be free from retaliation in the context of the First Amendment has long been recognized. Although the First Amendment does not expressly forbid retaliation, retaliation by government officials is prohibited under the Amendment because it "tends to chill citizens' exercise of their" rights to speech and association. *Perez*, 421 F.3d at 1131. This chilling effect applies to the Fifth Amendment right to exclude the government from one's property as well. It is clear that the right to exclude the government is not unlimited. Under the Takings Clause, the government may take private property for public use so long as it provides just compensation. U.S. Const. amend. V. When the government has chosen not to exercise its eminent domain power, however, citizens remain free to exclude even the government from their private property. *Kaiser*, 444 U.S. at 179-80, 100 S. Ct. 383. If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government,

and government officials will be more inclined to obtain private property by means outside the Takings Clause. The constitutional right to just compensation, in turn, would become meaningless. Because retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful.

*b. Clearly Established*

As evidenced by the citations above, the right to exclude others from one's property has long been recognized by the courts of this country. *See, e.g., Rakas*, 439 U.S. at 143 n. 12, 99 S. Ct. 421. Nevertheless, Defendants argue there is no authority specifically recognizing the right to be free from retaliation for the exercise of Fifth Amendment rights. That is, even if the right to exclude is clearly established, they are still entitled to qualified immunity because the right to be free from retaliation in the private property context is not clearly established. While this assertion is true, it does not follow that the right is not clearly established such that a reasonable official would understand that his actions violate the law. Although alleged rights violations must be analyzed at the proper level of generality, "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). No objectively reasonable government official would think he can retaliate against a citizen for that citizen's exercise of a clearly established constitutional right.

In *DeLoach v. Bevers*, this court examined whether the right to be free from retaliation for the exercise of First Amendment rights was clearly established. 922 F.2d 618, 620 (10th Cir. 1990). We stated that "[a]n act taken in re-

taliation for the exercise of a constitutionally protected right is actionable. . . . The unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established." *Id.* (citations and quotations omitted); *cf. United States v. Murphy*, 65 F.3d 758, 762-63 (9th Cir. 1995) (government cannot retaliate against defendant by refusing to file a motion for downward departure under the Federal Sentencing Guidelines because of defendant's failure to waive his Sixth Amendment right to a jury trial). Therefore, although no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights, *DeLoach* requires only that the right retaliated against be clearly established. As we noted above, the right to exclude others from one's property is well established. Robbins has thus sufficiently alleged a violation of his clearly established Fifth Amendment rights, and Defendants are not entitled to qualified immunity on Robbins' *Bivens* claim.

**2. RICO**

Robbins also alleges Defendants' conduct violated RICO. RICO provides civil remedies for "[a]ny person injured in his business or property by reason of a violation of 18 U.S.C. § 1962." 18 U.S.C. § 1964(c). Section 1962 in turn makes it unlawful for, *inter alia*, "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). Racketeering activity includes, among other predicate acts, any act indictable under the Hobbs Act and any act or threat involving extortion chargeable under state law. *Id.* § 1961(1)(A) & (B). Robbins alleges Defendants' actions amount to extortion under color of official right and by

wrongful use of fear in violation of the Hobbs Act and blackmail under Wyo. Stat. Ann. § 6-2-402.

The district court determined that Robbins sufficiently alleged Defendants engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402. Defendants do not contest this conclusion. Instead, Defendants argue that to be actionable under the Hobbs Act and Wyoming law, Defendants' attempts to obtain a right-of-way from Robbins must be independently wrongful. Defendants further contend that their actions were not wrongful because BLM regulations permit the BLM to require an applicant for a right-of-way across federal lands to grant the United States an equivalent right-of-way. 43 C.F.R. § 2801.1-2. Because Defendants had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, Defendants contend their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law. Defendants, however, apparently misunderstand Robbins' allegations. Robbins does not allege that Defendants committed extortion by attempting to obtain a right-of-way. Rather, he alleges Defendants' other actions, including refusing to maintain the road providing access to Robbins' property, cancelling Robbins' special recreation use permit and grazing privileges, bringing unfounded criminal charges against Robbins, trespassing on Robbins' private property, and interfering with Robbins' guest cattle drives, were all committed in an attempt to coerce Robbins into granting BLM a right-of-way. Thus, it is Defendants' actions other than seeking the right-of-way that Robbins alleges are extortionate. Although Defendants do not enumerate specific regulatory provisions permitting each of their actions, the

regulatory authority may exist.[3] Nevertheless, we conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO.

a. *Hobbs Act*

*(1) Statutory Right*

The Hobbs Act prohibits interference with interstate commerce by extortion, attempted extortion, or conspiracy to commit extortion. 18 U.S.C. § 1951(a). Extortion is defined in the Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

Although they do not phrase it as such, Defendants essentially assert a claim of right or good faith defense to Robbins' allegations that they violated the Hobbs Act. The claim of right defense provides that a person with a lawful claim of right to property cannot be liable for wrongfully acquiring it. *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991). The Supreme Court first recognized the defense in the context of the Hobbs Act in *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973). In *Enmons*, labor leaders who used violence during collective bargaining were charged with extortion. *Id.* at 397-98, 93 S. Ct. 1007.

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[3] Defendants do provide regulatory authority for some of their alleged conduct. Specifically, Defendants reference a BLM regulation which permits BLM to include in grazing permits "a statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. § 4130.3-2(h). Additionally, Defendants cite 43 C.F.R. § 2801.3(a) which states that the use of public lands requiring a right-of-way without authorization is a trespass.

The Court reversed the labor leaders' convictions, holding that the Hobbs Act did not prohibit the use of violence to achieve lawful labor union objectives, such as higher wages; rather, the Act only prohibits violence as a means of achieving illegal objectives, such as the exaction of personal payoffs. *Id.* at 400, 407, 93 S. Ct. 1007.

Several courts of appeals, including this court, however, have held that the claim of right defense should be limited to the facts of *Enmons*, specifically the use of force, violence, or fear in the context of a labor dispute. *Castor*, 937 F.2d at 299; *United States v. Zappola*, 677 F.2d 264, 268-69 (2d Cir. 1982); *United States v. French*, 628 F.2d 1069, 1074-75 (8th Cir. 1980); *United States v. Cerilli*, 603 F.2d 415, 419-20 (3d Cir. 1979); *United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977). As the Second Circuit explained in *Zappola*, Congress meant to define extortion in the Hobbs Act as it was defined under New York state law. 677 F.2d at 268; *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Moreover, at the time the Hobbs Act was enacted, it was clear under New York law that a claim of right to property that one obtains by violence, force, or threats was not a defense to extortion. *Zappola*, 677 F.2d at 268. Thus, outside the context of labor disputes, in passing the Hobbs Act, "Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force or criminal prosecution, regardless of the defendant's claim of right to the property." *Id.* at 269.

The claim of right defense has been rejected both in the context of extortion by actual or threatened physical violence and extortion under color of official right. For example, in *Warledo*, this court considered a case in which defendants, who were charged under the Hobbs Act for violence committed against various railroads, argued that they were not

guilty of extortion because their violence was aimed at obtaining money the railroad allegedly owed them pursuant to a lawful claim. 557 F.2d at 728-29. We rejected defendants' argument, reasoning that pursuit of an allegedly valid claim by threatened and actual physical violence was not a defense to Hobbs Act extortion. *Id.* at 730.

The claim of right defense was similarly rejected in a case involving extortion under color of official right in *Cerilli*. 603 F.2d at 418-21. Defendants in *Cerilli* were employees of the Pennsylvania Department of Transportation and were responsible for leasing equipment from private businesses to repair and maintain public roads. *Id.* at 418. Defendants sought payment from the individual business owners as a condition of their equipment being used and were charged with extortion under the Hobbs Act. *Id.* Defendants claimed, and the court accepted, that the payments they received were political contributions. *Id.* Defendants argued that because solicitation of political contributions is lawful, they were not guilty of extortion under color of official right for seeking the payments. *Id.* The Third Circuit rejected defendants' argument concluding that while "[t]he receipt of money [ ] by a political party . . . is generally not inherently wrongful. . . ., [t]he wrong under the Hobbs Act is the manner in which it is obtained." *Id.* at 419-20. These cases rejecting the claim of right defense establish that a lawful right to property or lawful authority to obtain property is not a defense to extortion; rather, if an official obtains property that he has lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act.

Defendants nevertheless argue that their conduct was not extortionate, but merely the zealous exercise of regulatory authority. Defendants cite *Sinclair v. Hawke*, in which the owner of a bank sued employees of the Office of the Comp-

troller of the Currency under RICO alleging they engaged in a pattern of racketeering activity.-314 F.3d 934, 939 (8th Cir. 2003). The court dismissed the RICO claim concluding that federal employees do not become racketeers by taking regulatory action consistent with their statutory powers. *Id.* at 943-44. In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from Robbins. The district court specifically determined there was a question of material fact regarding Defendants' intent.[4] If the trier of fact finds Defendants in fact intended to extort a right-of-way from Robbins, then Defendants' conduct was not merely the zealous exercise of regulatory authority; it was extortion and is actionable under the Hobbs Act.

*(2) Clearly Established*

The five circuits that have addressed the claim of right defense outside the labor context have rejected the defense. Although no court has rejected the claim of right defense under circumstances identical to the ones presented by this case, it is not necessary for the precise conduct of Defendants to have been previously held unlawful to defeat a claim of qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). It is sufficient if preexisting law put Defendants on fair notice that their conduct violated the law. *Id.*; *United States v. Lanier*, 520 U.S. 259, 270-71, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Moreover, although we must analyze alleged rights violations at the proper level of generality, "the degree of specificity required from prior case law depends in part on the character of the

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[4] We do not have jurisdiction to examine the district court's determination regarding evidentiary sufficiency on interlocutory appeal. *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997).

challenged conduct." *Pierce*, 359 F.3d at 1298. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Id.* Each of the five circuits that have addressed the issue have held that a lawful right to property or lawful authority to obtain property does not permit a defendant to use any means necessary to obtain the property. Thus, the weight of authority clearly prohibits Defendants' alleged conduct. *See Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 594 (10th Cir. 1999) (law was clearly established when six circuits, not including the Tenth Circuit, that had addressed the issue all came to the same conclusion). Further, in light of the egregious nature of Defendants' alleged conduct,[5] authority rejecting the claim of right defense generally and in cases involving extortion under color of official right specifically were sufficient to put Defendants on notice that their conduct violated the law. Viewing the facts in the light most favorable to Robbins, as we must, we conclude that Robbins has sufficiently alleged a violation of his clearly established statutory rights under the Hobbs Act.

b. *Wyoming law*

*(1) Statutory Right*

Robbins also alleges Defendants' violations of Wyo. Stat. Ann. § 6-2-402 qualify as predicate acts of racketeering activity under RICO. 18 U.S.C. § 1961(1)(A). Wyo. Stat. Ann. § 6-2-402 provides:

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[5] The district court noted that Robbins submitted "evidence of Defendants' alleged motive and intent, threats, lies, trespass, disparate treatment and harassment in the form of various depositions, including [the] deposition of a former BLM [employee], various letters, criminal trial transcript and trespass notices."

> (a) A person commits blackmail if, with the intent to obtain property of another or to compel action or inaction by any person against his will, the person:
>
> . . . .
>
> (ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society.[6]

Robbins alleges Defendants violated this provision by accusing and threatening to accuse him of various crimes to coerce him into granting BLM a right-of-way. Defendants once again argue that their conduct must be wrongful to constitute a violation of Wyoming law actionable under RICO. Specifically, Defendants note that the Supreme Court has held that because RICO defines racketeering activity as an "act or threat involving . . . extortion, . . . which is chargeable under State law," the conduct proscribed under the state law relied on must be capable of being generically classified as extortionate. *Scheidler*, 537 U.S. at 409, 123 S. Ct. 1057. Moreover, "generic extortion is defined as obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Id.* (quotations omitted). Therefore, Defendants urge "for the same reasons that Robbins' claims are not extortion under the Hobbs Act," they are not extortionate under Wyoming law.

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[6] Although the statute defines the crime as blackmail, it also notes that "[c]onduct denoted blackmail in this section constitutes a single offense embracing the separate crimes formerly known as blackmail and extortion." Wyo. Stat. Ann. § 6-2-402(c); *cf. United States v. Nardello*, 393 U.S. 286, 296, 89 S.Ct. 534, 21 L. Ed. 2d 487 (1969) (Travel Act's prohibition against extortion under state law applies to extortionate conduct classified by a state penal code as blackmail rather than extortion).

Defendants argument is, once again, unavailing. We agree that conduct proscribed under state law must be generically classified as extortionate to qualify as a predicate act under RICO. Nevertheless, for the same reasons Defendants' alleged lawful authority to require a reciprocal right-of-way from Robbins did not give them authority to use any means necessary to extort the right-of-way under the Hobbs Act, that authority does not provide a defense under Wyoming law.

*(2) Clearly Established*

The parties have not cited, and this court cannot find, any authority from Wyoming state courts addressing the applicability of the claim of right defense under Wyo. Stat. Ann. § 6-2-402. It is clear from the language of the statute, however, that Defendants' claim of lawful authority to require Robbins to grant BLM a right-of-way does not allow Defendants to accuse Robbins of a crime with the intent to obtain the right-of-way.

In *Lanier*, the Supreme Court noted that "the qualified immunity test is simply the adaptation of the fair warning standard [of criminal law]" to government officials facing civil liability. 520 U.S. at 270-71, 117 S. Ct. 1219. The fair warning standard requires the statute under which a defendant is charged, "either *standing alone* or as construed by the courts," make it reasonably clear that the defendant's conduct was criminal. *Id.* at 267, 117 S. Ct. 1219 (emphasis added). Thus, it follows that if the text of a statute clearly establishes the contours of a right, the statute alone is sufficient to put an objectively reasonable official on notice that conduct within the plain text of the statute violates that right for purposes of qualified immunity. *See Greene v. Barrett*, 174 F.3d 1136, 1142-43 (10th Cir. 1999) (property right was not clearly established, in part, because state statute was ambiguous).

The language of the Wyoming statute is unambiguous. The statute clearly establishes that it is unlawful to accuse or threaten to accuse a person of a crime with the intent to obtain that person's property or compel some other action or inaction. BLM regulations requiring a reciprocal right-of-way may be relevant to demonstrate that Defendants did not accuse Robbins of crimes with the intent to obtain a right-of-way because Defendants already had legal authority to require a right-of-way, and thus, did not need to extort one. BLM regulations, however cannot serve as a defense if the trier of fact finds that Defendants accused Robbins of crimes with the intent to obtain a right-of-way or to compel Robbins to grant a right-of-way, because the text of the statute clearly establishes that this conduct violates the statute. Because Robbins adduced sufficient evidence Defendants accused and threatened to accuse him of various crimes to obtain a right-of-way in clear violation of the text of the statute, Robbins has sufficiently alleged a violation of clearly established statutory rights under Wyoming law.

**C. Administrative Procedure Act**

Defendants also argue that Robbins' *Bivens* claim is precluded by the Administrative Procedure Act ("APA"). Specifically, this court previously held that the APA provides an alternative, equally effective remedy for individual action leading to a final agency decision. *Robbins I*, 300 F.3d at 1212-13. Therefore, we reasoned, only Robbins' allegations involving individual action unrelated to final agency action are permitted under *Bivens*. *Id.* Defendants claim the district court never examined Robbins' complaint to determine which allegations remain and which are precluded, and ask us to do so now.

The district court did not address whether any conduct alleged in Robbins' complaint is precluded by the APA because Defendants did not raise this issue in their motion for

summary judgment. Because we generally do not consider issues not raised below, we decline to address Defendants' argument. *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992).

## IV. Conclusion

For the foregoing reasons, this court affirms the district court's denial of defendants' motion for summary judgment on qualified immunity.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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No. 98-CV-201-B

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

*v.*

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICHAEL MILLER, GENE LEONE, DAVID WALLACE, DEFENDANTS-APPELLANTS

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Jan. 20, 2004

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**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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BRIMMER, J.

The matter is before the Court on Defendants' Motion for Summary Judgment. Upon reading the briefs, hearing oral argument, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

*Statement of the Parties and Jurisdiction*

Plaintiff Harvey Frank Robbins, is a resident of the State of Wyoming, residing in Hot Springs County, Wyoming. Defendant Charles Wilkie was an employee of the United States Bureau of Land Management ("BLM") as the Worland area manager. Defendant Wilkie was a BLM line officer. Defendant Darrell Barnes is an employee of the United States and the BLM. Defendant Barnes is the Worland

BLM District Manager. Defendant Michael Miller is an employee of the United States and the BLM. Defendant Miller is a BLM investigative and law enforcement officer. Defendant Gene Leone was an employee of the United States and the Worland BLM office. Defendant Teryl Shryack is an employee of the United States and the Worland BLM office. Defendant David Wallace is an employee of the United States and the Worland BLM office.

Jurisdiction is proper in the United States District Court under 28 U.S.C. § 1331 pursuant to the action being brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. § 1346(b)(1) and a *Bivens* claim. Venue is proper under 28 U.S.C. § 1391(e).

*Background*

In 1994, George Nelson owned the High Island Ranch in Hot Springs County, Wyoming. On April 5, 1994, Mr. Nelson granted a non-exclusive access easement to the Bureau of Land Management ("BLM") across his ranch. This easement ran along a private ranch road known as the Rock Creek Road. The BLM, however, failed to record this easement as required by Wyoming's recording statute. *See* Wyo. Stat. Ann. § 34-1-120 (providing that an unrecorded conveyance is void against a subsequent purchaser for value who, without notice, first records).

On May 31, 1994, Plaintiff purchased the High Island Ranch from Mr. Nelson. Plaintiff took the High Island Ranch without notice of the BLM's easement and recorded his interest in said ranch in Hot Springs County. Under Wyoming law, when Plaintiff recorded his deed the BLM's easement across Rock Creek Road was rendered void.

At the High Island Ranch, Plaintiff runs a commercial guest ranch operation and engages in cattle ranching. Plaintiff's ranch included a number of BLM livestock grazing

permits and preference rights. Pursuant to the grazing permits, livestock from Plaintiff's ranch were allowed to graze on federal land. Additionally, Plaintiff had a Special Recreational Use Permit ("SRUP") which allowed him to operate his commercial guest ranch activities on federal land. Among other things, Plaintiff would permit ranch guests to participate in cattle drives which occurred on federal land.

The BLM contacted Plaintiff to discuss the possibility of obtaining a new easement after it learned that its easement was no longer in effect. Plaintiff alleges that Defendants made a non-negotiable demand that he grant the BLM an easement across Rock Creek Road. Plaintiff refused to grant the BLM the easement.

Thereafter, Plaintiff alleges Defendants Wilkie, Barnes, Leone, Shryack, Miller and Wallace each engaged in a conspiracy to commit and/or committed two or more acts of attempted extortion under color of official right; attempted extortion by the wrongful use of fear under 18 U.S.C. § 1951 and/or extortion under Wyo. Stat. Ann. § 6-2-402 and abused their discretion. Specifically, Plaintiff alleges: (1) Defendants refused to maintain the road necessary for Plaintiff to access his private property in an effort to coerce Plaintiff to grant the BLM an easement; (2) Defendants Barnes and Wilkie threatened to cancel Plaintiff's right-of-way unless he granted the BLM an easement; (3) On July 21, 1995, Defendant Wilkie actually cancelled Plaintiff's right-of-way to coerce him to grant the BLM an easement; (4) Defendant Leone stated to fellow BLM employees that he was going to "bury Frank Robbins"; (5) Following an accident with Mrs. Pennoyer, Defendants used the incident as an excuse to cancel Plaintiff's SRUP; (6) On July 21, 1997, Defendants falsely conspired to accuse Plaintiff of a federal crime for the purpose of coercing him to grant the BLM an easement; (7) Defendants attempted to coerce Plaintiff to grant the BLM an

easement by interfering with Plaintiff's guest ranch operations by following guest cattle drives and trespassing on private property; (8) Defendants instigated a pattern of disparate enforcement of trespass regulations against Plaintiff in an effort to convince Plaintiff that they would "bury him"; (9) On November 6, 1995, the BLM employees revoked Plaintiff's SRUP to force Plaintiff to give the BLM an easement; and (10) Defendants Barnes, Shryack, Wallace, and Wilkie used frivolous allegations and decisions to take away Plaintiff's grazing privileges for the High Island, HD and Owl Creek ranches and to have Plaintiff's settlement agreement revoked by bringing false accusations before the Department of Interior, soliciting the help of various environmental anti-grazing organizations, and by publishing false statements to the press.

In sum, Plaintiff alleges that Defendants conspired to deny Plaintiff his clearly established constitutional rights by depriving Plaintiff of his property, subjecting him to financial harm, and harming his ranching and guest ranching businesses. Plaintiff has alleged civil rights violations of retaliation under *Bivens* and a RICO claim.

In 2002, Plaintiff began settlement negotiations with the Washington BLM Office. Defendants allegedly reacted by issuing six adverse decisions against Plaintiff in two days and actively contemplating impoundment of his cattle. Due to the ongoing settlement negotiations with Plaintiff, the Wyoming State BLM office told Defendant Barnes to back off.

On January 20, 2003, the BLM entered into a Settlement Agreement with Mr. Robbins. As part of the settlement, Defendants can still levy charges against Plaintiff but all such charges are first subject to an "informal dispute resolution" via the Director of the BLM. Plaintiff's RICO and *Bivens*

claims currently before this Court were not part of Mr. Robbins' settlement agreement.

Plaintiff prays for judgment against Defendants as follows: (1) Declaratory judgment that the Fence Easement provides Defendants only the limited right to use the Rock Creek Road for the specific purpose of repair and maintenance of the 276 feet of fencing; (2) Declaratory judgment that the Defendants have no right to enter onto the Plaintiff's private property other than that provided by the Fence Easement; (3) Declaratory judgment that the Fence Easement terminated by virtue of the Defendants' misuse; (4) Declaratory judgment that the alleged ability of Plaintiff's livestock to access BLM property, without actual evidence of trespass, is insufficient to permit the BLM to presume that Plaintiff's livestock have trespassed on BLM land; (5) Injunctive relief prohibiting Defendants from instigating further trespass actions against Plaintiff when they have no evidence that Plaintiff's livestock have actually entered onto BLM lands where they are not permitted; (6) Compensatory damages; (7) Damages for emotional distress; (8) Treble damages pursuant to 18 U.S.C. § 1964(c); (9) Costs of suit; (10) Actual attorneys' fees; (11) Prejudgment interest; and (12) Punitive damages.

On November 4, 2003, Plaintiff filed a Third Amended Complaint which added one Defendant, David L. Wallace, but did not expand on the legal issues presented by Plaintiff in his Second Amended Complaint. Therefore, this Order on Defendants' Motion for Summary Judgment will apply to the legal issues and pleadings in Plaintiff's Third Amended Complaint.

*Legal Standards*

I. *Motion for Summary Judgment.*

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 123 L. Ed. 2d 317 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When the non-moving party bears burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 10 6 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

II. *Qualified Immunity.*

Defendants have, on two prior occasions, filed motions to dismiss seeking dismissal of Plaintiff's complaint on the basis of qualified immunity. On Defendants' first Motion to Dismiss, this Court issued a decision in May, 2001, dismissing Plaintiff's second amended complaint in its entirety based on qualified immunity. The order was reversed by the Tenth Circuit Court of Appeals in August, 2002. *See Robbins v. Wilkie*, 300 F.3d 1208 (10th Cir. 2002). As a result of the Tenth Circuit's reversal, Defendants subsequently filed a second motion to dismiss which this Court granted in part and denied in part in March, 2003.[7] *See Robbins v. BLM*, 252 F. Supp. 2d 1286 (D. Wy. 2003). Defendants are now before the Court upon Defendants' Motion for Summary Judgment, requesting the Court dismiss the second amended complaint based on qualified immunity.[8]

Defendants argue that the doctrine of qualified immunity protects them for any liability due to the "objective legal reasonableness of an official's acts." (Br. in Supp. of Defs.' Mot. for Summ. Judgment ("Defs.' Br."), at p. 14). Plaintiff responds that qualified immunity does not shield Defendants from suit if the statutory or constitutional right which was violated was clearly established such that a reasonable pub-

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[7] This Court Denied Defendants' Motion to Dismiss Plaintiff's Second Amended Claim as to Plaintiff's: (1) First claim for Relief, violation of RICO; and (2) unconstitutional retaliation claim under *Bivens*. This Court Granted Defendants' Motion to Dismiss Plaintiff's Second Amended Claim as to Plaintiff's: (1) alleging a violation of the Fourth Amendment; and (2) alleging a violation of procedural and substantive components of the Due Process Clauses of the Fifth and Fourteenth Amendments.

[8] On November 4, 2003, this Court granted Plaintiff leave to file a Third Amended Complaint which did not add any legal issues, but only additional facts and Defendant David Wallace. Both parties have been allowed to supplement their original briefs to the Court.

lic official would have known that their actions were violating that right. (Pl.'s Opp'n to Defs.' Mot. for Summ. Judgment ("Pl.'s Opp'n. Br.") at p. 16).

Qualified immunity protects federal officials from individual liability unless the officials violated a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). The purpose of qualified immunity is to encourage "public officials to act independently and without fear of consequences if there is no violation of a clearly established right." *Garrett v. Stratman*, 254 F.3d 946, 950-51 (10th Cir. 2001) (internal quotations and citations omitted).

The Tenth Circuit has explained the framework a district court should follow when considering an assertion of qualified immunity:

> The plaintiff bears a heavy two-part burden when defendant pleads the defense of qualified immunity . . . The plaintiff must show: (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue. Unless the plaintiff carries its twofold burden, the defendant prevails.

*Brewer*, 76 F.3d at 1134. "To be clearly established, 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed. 2d 523 (1987)).

This Court has already held that the alleged violation of the RICO statute (Plaintiff's First Claim in the Third

Amended Complaint) was a "clearly established right" which an objectively reasonable BLM employee would know of:

> [t]aking Plaintiff's well-pleaded allegations as true, Defendants Vessels, Barnes, Wilkie, Leone, Shyrack, Merrill, Stimson, and Miller engaged in a pattern of racketeering activity, *i.e.*, extortion, under the color of official right in an attempt to force Plaintiff to grant the BLM an easement. An objectively reasonable BLM employee performing his discretionary functions, in light of the clearly established laws prohibiting extortion, would not have engaged in the activity alleged in Plaintiff's Second Amended Complaint. In other words, assuming Plaintiff's allegations are true, Defendants' actions violated the objective legal reasonableness standard because the unlawfulness of these actions would have been apparent in light of pre-existing law.

*Robbins*, 252 F. Supp. 2d at 1295. Therefore, this Court has already held that Plaintiff has carried the two-fold burden set out in *Brewer* in regards to Plaintiff's RICO claim.

This Court has also addressed the "clearly established" issue regarding Plaintiff's *Bivens* claim for unlawful retaliation under the Fifth Amendment (Plaintiff's second claim in the Third Amended Complaint). This Court held:

> The Court concludes that the universally accepted "right to exclude" is a clearly established right protected by the Constitution. Plaintiff has alleged that he attempted to exclude the defendants from his property on numerous occasions and that in response, Defendants retaliated against him for exercising that property right. As a result, because this Court concludes that the "right to exclude" is [sic] was clearly established, the "unlawful intent inherent in such retaliatory action places it beyond

> the scope of a [federal] officer's qualified immunity . . ." *DeLoach*, 922 F.2d at 620.

*Robbins*, 252 F. Supp. 2d at 1301-02. Again, this Court has already held that Plaintiff carried the two-fold burden in regard to the *Bevins* claim.

The "law of the case" doctrine states that a court "should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912)). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). This Court is convinced that its prior ruling that the RICO claim and the unlawful retaliation *Bivens* claim were clearly established at the time of the alleged violation and survive the *Brewer* two-fold burden test. Defendants have spent a large portion of their Motion for Summary Judgment in regards to qualified immunity but this Court was not erroneous and believes that adherence to its previous decision would not work a "manifest injustice."

Defendants contend that this Court should reconsider its previous ruling on the RICO and *Bivens* claims since a motion of summary judgment is a different standard than a motion to dismiss. (Defs'. Br., at p. 14). Defendants cite the United States Supreme Court which recognized a motion to dismiss and a motion for summary judgment considered different legally relevant factors. (*Id.*).

> [T]he legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct as alleged in the complaint that is scruti-

nized for "objective legal reasonableness." On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. R. Civ. Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry.

*Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S. Ct 834, 133 L. Ed. 2d 773 (1996). This Court has reviewed the Plaintiff's Proposed Findings of Fact, Conclusions of Law and the 248 exhibits attached to the Plaintiff's Opposition to Defendant's Motion for Summary Judgment. Taken in the light most favorable to the plaintiff, Robbins has provided ample evidence to support the allegations in his third amended complaint and has not solely rested on his pleadings.

The burden then shifts to Defendants since Plaintiff carried his two-part burden. *Albright*, 51 F.3d at 1535. Defendants bear the burden, as an ordinary movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity. *Id.*; *see also* Fed. R. Civ. P. 56(c).

Defendants argue that there is no material issue of fact in question since a fact-finding team was appointed by the BLM Deputy Director Fran Cherry in February, 2002. (Defs'. Br., at p. 6). The team consisted of Tom Walker, Deputy Assistant Director, Business and Fiscal Resources, BLM, Washington Office; Tim Reuwsaat, Group Manager, Rangelands, Soil, Water and Air, BLM, Washington office; and John Silence, Special Agent in Charge, Colorado Office, BLM. (*Id.*). The team, on April 16, 2002, issued a document entitled "Fact-Finding Review-Frank Robbins" which sets forth Plaintiff's allegations, the BLM responses, and the team's recommendations. Defendants claim that the report vindicates the BLM and the actions of Defendants. (*Id.*). Defendants state that the fact-finding review was completed by disinterested parties and the report clearly undercuts all

assertions by Plaintiff that the acts of the defendants somehow rose to the level of extortion or retaliation. (*Id.*, at p. 7).

If the fact-finding report was taken as completely true, Defendants would have grounds for summary judgment since there would be no issue of material fact dealing with qualified immunity or the RICO or *Bivens* claims. Defendants have attached to their Brief in Support of Summary Judgment, a "briefing paper" completed by Defendant Barnes for the review and use of the fact-finding team. (Defs'. Br., Bates 3273-3303). The fact-finding team used this information to compile the fact-finding report.

However, a review of the fact-finding report does not provide an uncontroverted factual basis which proves that Plaintiff cannot prevail under any circumstance. In addition, the report does not address all of the factual issues presented by the Plaintiff in his Third Amended Complaint or his 248 attached exhibits. Plaintiff provides a significant amount of evidence which could lead a jury to conclude that Defendants did intend and agreed to extort and punish Plaintiff.[9] *See* (Pl.'s Opp'n. Br., at pp. 33-48).

Plaintiff's evidence includes multiple letters, depositions and trial transcripts which provide enough evidence, especially taken in a light most favorable to Plaintiff, "such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be be-

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[9] Plaintiff has submitted evidence of Defendants' alleged motive and intent, threats, lies, trespass, disparate treatment and harassment in the form of various depositions, including a deposition of a former BLM Edward Parodi, various letters, criminal trial transcript and trespass notices.

lieved, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255; *First Security Bank of New Mexico v. Pan American Bank*, 215 F.3d 1147, 1154 (10th Cir. 2000). Therefore, Defendants failed to show no material issues of fact remained that would defeat the claim of qualified immunity at the Summary Judgment level. This Court will make a final ruling on the issue of qualified immunity after hearing all of the evidence provided in trial and after the jury has decided the RICO and *Bivens* claims.

III. *Summary Judgment under RICO.*

Plaintiff argues this case involves two separate provisions of RICO, 18 U.S.C. § § 1962(c) and 1962(d).[10] (Pl.'s Opp'n. Br., at p. 3). To establish a civil RICO claim under 18 U.S.C. § 1962(c), the plaintiff must show that the defendants: (1) participated in the conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Bancoklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). Racketeering activity includes, among other predicate acts, activity that is indictable under the Hobbs Act and any act involving extortion chargeable under state law. 18 U.S.C. § 1961(1)(A)-(B). A pattern of racketeering activity consists of two or more acts of racketeering activity. *Id.*

The Hobbs Act provides that whoever affects commerce in any way by extortion, or attempts or conspires to do so, may be fined or imprisoned, or both. 18 U.S.C. 1951(a). Extortion is "the obtaining of property from another, with his

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[10] 18 U.S.C. § 1962(c) states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b) (2). At common law, a public official who obtained the property of another, to which neither the official nor the government office was entitled, was guilty of extortion. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402-03, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). Further, Congress has explicitly recognized that agents of the United States can be liable for the crime of extortion under the color of official right. 18 U.S.C. § 872; *United States v. Culbert*, 435 U.S. 371, 373 n. 3, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978).[11]

In Wyoming "[a] person commits blackmail if, with the intent to obtain property of another or compel action or inaction by any person against his will, the person: (i) Threatens . . . injury to the property of another person; or (ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society." Wyo. Stat. § 6-2-402 (2003).

A. *"Obtaining" of Property under The Hobbs Act.*

Defendants further argue that Plaintiff cannot bring the RICO claim under the Hobbs Act. Defendants argue that the Supreme Court in *Scheidler* limited RICO relief under the Hobbs Act to those circumstances where property is actually "obtained," and that Plaintiff cannot prove extortion because Defendants never actually "obtained" an easement from Plaintiff. (Defs'. Br., at 31-32). Plaintiff counters by arguing *Scheidler* did not hold that Defendant must first "obtain" the property to be found liable but simply held that interference with an *intangible business interest* could not be a property

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[11] The Court in *Culbert* cites 18 U.S.C. § 1951(b) which provides: "Extortion means the obtaining of property from another, . . . under color of official right."

interest capable of being "obtained" for purposes of the Hobbs Act. (Pl's. Opp'n. Br., at 24).

The plaintiff, in *Scheidler*, asserted that the defendants violated the Hobbs Act by "seeking to get control of the use and disposition of respondents' property." *Id.*, 537 U.S. at 401. Plaintiff argued that because the "right to control the use and disposition of an asset is property, petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property." *Id.* The United States, in an *Amicus Curiae* brief stated "where the property at issue is a business's *intangible* right to exercise exclusive control over the use of its assets, [a] defendant obtains that property by obtaining control over the use of those assets." *Id.*

The Supreme Court indicated that, in the context of a civil RICO action, property must be "obtained" before there can be a violation of the Hobbs Act:

> While the Hobbs Act expanded the scope of common law-extortion to include private individuals the statutory language retained the requirement that property must be "obtained." See 18 U.S.C. § 1952(b)(2). . . . Most importantly, we have construed the extortion provision of the Hobbs Act at issue in this case to require not only the deprivation but also the acquisition of property. *See e.g. Emmons, supra* at 400, 93 S.C. 1007 . . . With this understanding of the Hobbs Act's requirement that a person must "obtain" property from another party to commit extortion, we turn to the facts of these cases.

*Scheidler*, 537 U.S. at 402.

In *Scheidler*, there was no dispute that the defendants interfered with, disrupted, and in some instances completely deprived plaintiffs of their ability to exercise their property rights. *Id.*, at 404. However, the Court held that "even

when their acts of interference and disruption achieved their ultimate goal of 'shutting down' a clinic that performed abortions, such acts did not constitute extortion because petitioners did not 'obtain' respondents' property . . . Petitioners neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.*, at 404-05 (citing *United States v. Nardello*, 393 U.S. 286, 89 S. Ct 534, 21 L. Ed. 2d 487 (1969)).

Plaintiff argues that all that is required to be held liable under the Hobbs Act, is the property that is the subject of extortion must be capable of being "obtained" and that in *Scheidler* the interference with intangible interests are not capable of being "obtained." (Pl's. Opp'n. Br., at 24). In the case at hand, it is true that Defendants never obtained Plaintiff's property. However, Defendants did pursue something of value, an easement, from Plaintiff that they could have "exercised, transferred or sold." Unlike the intangible interests in *Scheidler*, the case at hand involves property that is capable of being "obtained."

In addition, the Hobbs Act states that attempted extortion or conspiracy to commit extortion are equal to crimes of extortion.[12] 18 U.S.C. § 1951(a). Therefore, the focus is whether the property could be obtained not whether it was actually obtained. The property in this case, an easement, could have been obtained by Defendants. Plaintiff has provided enough evidence to show a material question of fact as to whether Defendants attempted to extort or conspired to commit extortion, in order to obtain the said easement.

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[12] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. 1951(a) (emphasis added).

B. *Predicate Acts of Racketeering.*

Defendants argue that the alleged "overt acts" asserted by Plaintiff are not independently wrongful under RICO as Defendants were merely acting to enforce federal statutes and regulations and therefore cannot give rise to racketeering. (Defs'. Br., at 33). Defendants cite *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000) in support of their argument that the underlying acts which allegedly give rise to the "racketeering" component of a RICO violation must themselves be acts of racketeering. (Defs'. Br., at 32-33). The Supreme Court held that:

> [We] conclude that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO, (citation omitted) is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by any "act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an act of tortious character" (citation omitted), meaning an act that is independently wrongful under RICO. The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed.

*Beck*, 529 U.S. at 505.

This Court agrees with Defendants that the overt acts must be acts of racketeering or otherwise wrongful under RICO. However, this Court disagrees with Defendants that the acts of giving citations, trespass notices and other actions taken within the scope of their employment are not independently wrongful under RICO. Plaintiff has supported

with evidence his claim that Defendants' acts were independently wrongful under RICO by virtue of their intended use by Defendants. Plaintiff claims that Defendants intended to use their otherwise lawful authority to extort Plaintiff. This Court has already held that Defendants could have taken certain actions within the scope of their employment which are independently wrongful under RICO if it is proven that those acts were done for the purpose or intent of extorting Plaintiff. Therefore, there is a question of material fact whether the individual Defendants intended to extort Plaintiff through the individual Defendant's acts which gives rise to the racketeering component.

C. *"Operation and Management" Test.*

Defendants argue that the United States Supreme Court in construing 18 U.S.C. § 1962(c), and particularly the terms "conduct and participate", clearly conclude that both terms require an element of direction in the affair of the alleged enterprise. (Defs.' Br., at 33). Defendants state that Defendants Shryack, Leone and Miller are not involved in the direction of the enterprise (the Worland BLM office) and therefore are not liable under RICO.

The Supreme Court in *Reves v. Ernst and Young*, developed the "operation or management" test to determine whether alleged activities were sufficient to come within the scope of "conduct and participate." 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). The Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO li-

> ability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" make clear that RICO liability is not limited to those with a formal position in the enterprise but some part in directing the enterprise's affairs is required.

*Reves*, 507 U.S. at 179. The Supreme Court further stated that "liability under § 1962(c) is not limited to upper management, . . . [a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.*, at 184. "In so holding the Court [in *Reves*] made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." *United States v. Parise*, 159 F.3d 790, 796 (3rd Cir. 1998).

Defendants Shryack, Leone and Miller point out they had no management authority nor directly dealt with the BLM agency. However, how much, if any, management authority or how they may have knowingly furthered the illegal acts of the enterprise is a question of fact:

> [T]he commission of crimes by lower level em ployees of a RICO enterprise may be found to indicate participation in the operation or management of the enterprise . . . Unless a civil RICO defendant is indisputably directing the affairs of the enterprise, his commission of crimes that advance its objectives must be assessed by a fact-finder to determine whether or not his criminal activity, assessed in the context of all the relevant circumstances, constitutes participation in the operation or management of the enterprise's affairs.

*United States v. Pagano*, 155 F.3d 35, 42 (2nd Cir. 1998). Therefore, as a question of fact, the issue must proceed to a

trier of fact and summary judgment is not appropriate, even though this Court cannot anticipate that a Wyoming jury would ever award damages to the Plaintiff against the Defendant hard-working, faithful employees of the BLM.

IV. *Unlawful Retaliation Bivens claim under the Fifth Amendment.*

Plaintiff has alleged that he was retaliated against for exercising his constitutional right to the quiet use and enjoyment of private property, control of private property, the right to exclude others from private property, and the right to be free from extortion by government officials in the exercise of these rights. Plaintiff alleges that he was retaliated against for exercising his constitutional right to control, and exclude others, from his private property.

The Tenth Circuit has held that an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983, and hence in a *Bivens* action. *Deloach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). To state a claim for unconstitutional retaliation, a plaintiff must allege: (1) exercise of a constitutionally protected right; (2) retaliatory actions by government officials in response to the exercise of such constitutional right; and (3) more than a "theoretical" injury. *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).

Defendants agree that the exclusion of others from private property is a constitutional right. (Defs.' Br., at 37). However, Defendants contend that Plaintiff did not have the right to exclude BLM employees from his private property pursuant to an Interior Board of Land Appeals ("IBLA") decisions with regards to administrative access. (*Id.*). The IBLA has stated that the BLM and its employees have at a minimum an implied if not an express right of administrative access to enter Plaintiff's private property in order to carry

out their statutorily mandated duties of supervising grazing permits and protecting public lands. (*Id.*).

This Court agrees with Defendants and the IBLA that the BLM and its employees have a right to administrative access to Plaintiff's property in order to carry out certain duties. However, this does not give Defendants carte blanche access to enter Plaintiff's private property. Plaintiff still has the right to refuse the BLM an easement and can exercise his right to exclude others, including BLM employees, when they are not on mandated duties.

Plaintiff continues to have a constitutionally protected property right to exclude others from his private property and to refuse to grant the BLM an easement. A question of fact for a jury is whether Defendants' actions were retaliatory in response to the exercise of such constitutional right. Therefore, Summary Judgment is not appropriate on the issue of Plaintiff's *Bivens* claim for unlawful retaliation under the Fifth Amendment.

V. *Individual Defendants Involvement.*

Defendants list and explain how each Defendant should be dismissed on the basis of qualified immunity and on the basis that there is no admissible evidence to support any RICO or *Bivens* violations. (Defs'. Br., at 42-46). Defendants state that they "clearly and affirmatively state they did not conspire or agree with anyone at anytime for any purpose with regards to Plaintiff, particularly to commit any alleged predicate acts of extortion or retaliation, and Plaintiff can present no admissible evidence to the contrary." (*Id.*). However, this Court will not solely rely upon the statements of the individual Defendants and will view all of the material facts presented by all parties, in the light most favorable to Plaintiff. Plaintiff has presented a multitude of material facts which demonstrate that Defendants potentially en-

gaged in a pattern of racketeering activity. *See* (Pl's. Opp'n Br., pp. 51-63). Whether each individual Defendant substantially engaged in racketeering activity is a question of fact which should be submitted to a jury.

*Conclusion*

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment is to isolate, and then terminate, claims and defenses that are factually unsupported. *Celotex*, 477 U.S. at 323-24. A "genuine" issue exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. Considering that Plaintiff has provided evidence in the form of depositions, trial transcripts, letters, affidavits and e-mails, which if believed, and all justifiable inferences are to be drawn in his favor, has met his burden that genuine issues of material fact remain for the fact finder to resolve.

For the aforementioned reasons, it is hereby ORDERED that Defendants' Motion for Summary Judgment is DENIED.

**DATED THIS 16TH DAY OF JANUARY, 2004.**

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

*v.*

BUREAU OF LAND MANAGEMENT ("BLM"), DEPARTMENT OF THE INTERIOR, THE UNITED STATES OF AMERICA; CHARLES WILKIE, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; DARRELL BARNES, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; TERYL SHRYACK, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; PATRICK MERRILL, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; DAVID STIMSON, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; MICHAEL MILLER, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; GENE LEONE, INDIVIDUALLY AND AS AN EMPLOYEE OF THE BLM; AND JOHN DOES 1 THROUGH 20, DEFENDANTS

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Mar. 21, 2003

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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

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BRIMMER, District Judge.

This case arises out of a dispute between a Wyoming rancher and the federal government over a property interest in a small strip of land known locally as Rock Creek Road. The matter is currently before the Court on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. Upon reading the briefs, hearing oral argument, and being

fully advised of the premises, the Court FINDS and ORDERS as follows:

***Statement of the Parties and Jurisdiction***

Plaintiff, Harvey Frank Williams, is a resident of Wyoming. Plaintiff is the owner of the High Island Ranch in Hamilton Dome, Wyoming, which is located in Hot Springs County.

Defendant Department of the Interior is an agency of the United States headed by the Secretary of the Interior. Defendant Bureau of Land Management ("BLM") is a subordinate agency of the Department of Interior. Among other things, the BLM is charged with the administration of public lands in the United States. Defendant Joe Vessels is a BLM assistant manager and line officer. Defendant Charles Wilkie is a BLM area manager and line officer. Defendant Darrell Barnes is a BLM district manager. Defendants Michael Miller and David Stimson are BLM investigative and law enforcement officers whose duties include investigating criminal offenses and making recommendations regarding prosecution. Defendants Gene Leone, Patrick Merrill, and Teryl Shryack are employees of the BLM. Defendants John Does 1 through 20 are unknown federal officers who participated in the wrongful conduct alleged in Plaintiff's Complaint.

The Court has exclusive jurisdiction over this matter. 28 U.S.C. § 1346(b)(1). Venue is proper in the District of Wyoming. 28 U.S.C. § 1391(e)(1), (2).

***Background***

In 1994, George Nelson owned the High Island Ranch in Hamilton Dome, Wyoming. (Second Am. Compl., at ¶ 16). On April 5, 1994, Mr. Nelson granted a non-exclusive access easement to the BLM across his ranch. (*Id.* at ¶ 21). The easement ran along a private ranch road known as the Rock Creek Road. (*Id.*). The BLM, however, failed to record this easement as required by Wyoming's recording statute. (*Id.* at ¶ 21; *See also* Wyo. Stat. Ann. § 34-1-120 (providing that an unrecorded conveyance is void against a subsequent purchaser for value who, without notice, first records)).

On May 31, 1994, Plaintiff purchased the High Island Ranch from Mr. Nelson. (*Id.* at ¶ 16). Plaintiff took the High Island Ranch without notice of the BLM's easement and recorded his interest in Hot Springs County. (*Id.* at ¶ 23). Under Wyoming law, when Plaintiff recorded his deed, the BLM's easement across Rock Creek Road was extinguished. Wyo. Stat. Ann. § 34-1-120.

At the High Island Ranch, Plaintiff runs a commercial guest ranch and engages in cattle ranching. (*Id.* at ¶ 17). Plaintiff's ranch includes a number of BLM livestock grazing permits and preference rights. (*Id.* at ¶ 18). Pursuant to the grazing permits, livestock from Plaintiff's ranch may graze on federal land. (*Id.*). Additionally, Plaintiff had a Special Recreational Use Permit, which allowed him to operate his commercial guest ranch activities on federal land. (*Id.* at ¶ 19).

Defendant Vessels contacted Plaintiff to discuss the possibility of obtaining a new easement after he learned that the BLM's easement was extinguished. (*Id.* at ¶ 26). Defendant Vessels made a non-negotiable demand that Plaintiff grant the BLM an easement across Rock Creek Road. (*Id.*). Plaintiff refused to grant the BLM an easement. (*Id.* at ¶ 30).

Thereafter, Defendants engaged in a pattern of behavior and conduct in an attempt to persuade Plaintiff to re-grant the BLM an easement across Rock Creek Road. (*Id.* at ¶ 31). In June 1994, Defendant Vessels wrote to Plaintiff requesting permission to enter his land to perform a survey for the proposed easement. (*Id.* at ¶ 32). Plaintiff denied the BLM access to his property to conduct the survey. (*Id.* at ¶ 33). Nevertheless, the BLM entered Plaintiff's property without his permission and conducted the survey. (*Id.* at ¶ 34).

On February 23, 1995, Defendant Vessels informed Plaintiff that his right-of-way across federal lands to reach some of his landlocked property would be terminated if he did not grant the BLM an easement across Rock Creek Road. (*Id.* at ¶ 39). Again, Plaintiff declined the BLM's request to grant it an easement. (*Id.* at ¶¶ 30, 36). After this last denial, the BLM allegedly developed an internal policy aimed at coercing Plaintiff into granting the BLM an easement. (*Id.* at ¶ 39). Pursuant to this policy, Defendant Vessels and his subordinate employees began harassing Plaintiff. (*Id.*).

Specifically, Plaintiff alleges that pursuant to this internal policy: (1) the BLM refused to follow the terms and conditions of the High Island Ranch Allotment Management Plan in good faith, which resulted in Plaintiff not being able to obtain any flexibility in grazing operations, (*id.* at ¶ 39); (2) Defendant Vessels cancelled Plaintiff's right-of-way across federal land, (*id.* at ¶ 40); (3) BLM officers urged Plaintiff's neighbors to file a criminal complaint against him and provoked disputes between Plaintiff and his neighbors, (*id.* at ¶¶ 41, 43); (4) the BLM frivolously prosecuted Plaintiff for livestock trespass, (*id.* at ¶ 45); (5) BLM employee Ed Parodi informed Plaintiff that if he kept butting heads with the BLM, the dispute would "get ugly," "come to war," and that the BLM would give Plaintiff a "hardball education," (*id.* at ¶

46); (6) the BLM trespassed on Plaintiff's property by representing that a fence easement was a general right of way easement, (*id.*, at ¶¶ 48-56);[1] (7) Defendants Barnes and Vessels enticed Plaintiff to come to the BLM office by telling him they wanted to discuss his grazing allotment and instead subjected him to a surprise interrogation by BLM law enforcement officers David Stimson and Michael Miller, (*id.* at ¶¶ 70-73); and (8) after the interrogation, the BLM convinced the United States Attorney's Office to prosecute Plaintiff for interfering with federal employees engaged in the performance of their official duties, (*id.* at ¶¶ 90(s)-(t)).

On August 12, 1998, Plaintiff filed suit in federal district court. Plaintiff's Second Amended Complaint: (1) alleges that Defendants, in their individual capacities, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; and (2) asserts a *Bivens* claim based on allegations that Defendants violated Plaintiff's federal constitutional rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that an individual has a cause of action against a federal official in his individual capacity for damages arising out of the official's violation of the Constitution under the color of federal authority).

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[1] In July 1997, Plaintiff encountered Defendants Teryl Shryack and Patrick Merrill traveling in a pickup truck along Rock Creek Road. Plaintiff informed these BLM employees that they did not have permission to trespass across his property. In response, Defendants Shryack and Merrill provided Plaintiff a copy of the fence easement. Plaintiff tore up the easement and told the BLM employees to leave, which they did. As a result of this incident, Plaintiff was charged with forcibly impeding or interfering with a BLM officer in violation 18 U.S.C. § 111. Plaintiff was acquitted of that charge after a three-day jury trial. (*See* Pl.'s Second Am. Compl. at ¶¶ 60-69, 160-169).

***Legal Standards***

A. *Fed. R. Civ. P. 12(b)(1).*

A motion to dismiss based on qualified immunity is treated as a motion to dismiss for lack of subject matter jurisdiction. *Meyers v. Colo. Dep't of Human Services*, No. 02-1054, 2003 WL 1826166, 2003 U.S. App. LEXIS 199, *2-3 (10th Cir. Jan. 6, 2003). The party invoking federal jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists. *United States ex. rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245, 1249 (10th Cir. 2002). A motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) may take two forms. When a defendant makes a facial attack on the complaint's allegations, which challenges the sufficiency of the complaint, the district court will accept the plaintiff's allegations as true. *Cal. Cas. & Fire Ins. Co. v. Brinkman*, 50 F. Supp. 2d 1157, 1161 (D. Wyo. 1999). If, however, the defendant goes beyond the allegations contained in the complaint and challenges the facts upon which subject matter jurisdiction depends, the district court will not presume the truthfulness of the plaintiff's allegations and has wide discretion to consider other documents to resolve the jurisdictional question. *Id.*

B. *Fed. R. Civ. P. 12(b)(6)*

A federal district court may dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) only when it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). The district court must assume the plaintiff's allegations are true and construe them liberally in the light most favorable to him. *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99; *Grossman v.*

*Novell, Inc.*, 120 F.3d 1112, 1118 (10th Cir. 1997). However, the district need only accept the well-pleaded allegations in the complaint as true and is not required to accept "conclusory allegations, unwarranted inferences, or legal conclusions in a complaint." *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) (internal quotation marks omitted).

Qualified immunity is an affirmative defense that must be pleaded by governmental officials. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). The qualified immunity defense may be asserted in a Rule 12(b)(6) motion. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir.1988). The district court must accept as true all well-pleaded factual allegations in the complaint when reviewing a Rule 12(b)(6) motion in which qualified immunity is asserted as a defense. *Neiberger v. Hawkins*, 70 F. Supp.2d 1177, 1181 (D. Colo. 1999). However, the determination of whether a federal law "was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L.Ed. 2d 344 (1994); *Medina v. Cram*, 252 F.3d 1124, 1127-28 (10th Cir. 2001).

***Analysis***

Defendants argue the doctrine of qualified immunity protects them from any liability under Plaintiff's Second Amended Complaint. (Br. in Supp. of Defs.' Mot. to Dismiss Second Am. Compl. of Pl. ("Defs.' Br."), at p. 13). Plaintiff responds that qualified immunity does not shield Defendants from suit because the allegations in the Second Amended Complaint establish violations of clearly established federal law. (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Opp'n Br."), at p. 20).

### A. Qualified Immunity

Qualified immunity protects federal officials from individual liability unless the officials violated a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). The purpose of qualified immunity is to encourage "public officials to act independently and without fear of consequences if there is no violation of a clearly established right." *Garrett v. Stratman*, 254 F.3d 946, 950-51 (10th Cir. 2001) (internal quotations and citations omitted).

The Tenth Circuit has explained the framework a district court should follow when considering an assertion of qualified immunity: The plaintiff initially bears a heavy two-part burden when defendant pleads the defense of qualified immunity. . . . The plaintiff must show: (1) that the defendant's actions violated a constitutional or statutory right, and (2) that the right allegedly violated was clearly established at the time of the conduct at issue. Unless the plaintiff carries its twofold burden, the defendant prevails.

*Brewer*, 76 F.3d at 1134 (internal quotation marks, citations, and brackets omitted). In the context of a Rule 12(b)(6) motion, if the plaintiff carries this burden then the motion to dismiss must be denied. *See Hawkins*, 70 F. Supp. 2d at 1191.[2]

A constitutional or statutory right is "clearly established" when the contours of the right are sufficiently evident that a reasonable official would understand that what he was doing

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[2] In the context of a motion for summary judgment, the burden would shift back to the defendant to prove there were no material issues of fact that would defeat the claim of qualified immunity. *Brewer*, 76 F.3d at 1134.

violated that right. *Cram*, 252 F.3d at 1128. The Tenth Circuit has explained:

> Although the very action in question does not have to have previously been held unlawful, in light of the pre-existing law the unlawfulness must be apparent. . . . Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains.

*Brewer*, 76 F.3d at 1134 (internal quotation marks and citations omitted); *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987); *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

The Supreme Court has held that an opinion on point from a particular court is not required for the law to be clearly established. *United States v. Lanier*, 520 U.S. 259, 271-72, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Rather, the dispositive issue is whether the state of the law at the time of the lawsuit gave the federal officials "fair warning" that their alleged treatment of the plaintiff was in violation of his constitutional or statutory rights. *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002). A general statement of the law, such as in a criminal statute, is capable giving federal officials "fair warning." *Id.*; *Lanier*, 520 U.S. at 271, 117 S. Ct. 1219. Additionally, "[i]f the law is clearly established, the [qualified] immunity defense will ordinarily fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

In sum, the "general rule is that a qualified immunity defense fails once a plaintiff has alleged that defendants have

violated the plaintiff's clearly established rights." *Roska v. Peterson*, 304 F.3d 982, 1000 (10th Cir. 2002). In practice, this means that whether a governmental official performing discretionary functions is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's actions in light of the clearly established law at the time the actions were taken. *Wilson v. Layne*, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999).

### B. Plaintiff's RICO Claim

Plaintiff argues he has a statutory right to be free from extortion. (Pl.'s Br. in Opp'n, at p. 28). Therefore, Plaintiff contends that Defendants are not shielded by qualified immunity because they knowingly violated the clearly established Hobbs Act, 18 U.S.C. § 1951, and the Wyoming Blackmail (extortion) statute, Wyo. Stat. Ann. § 6-2-402(a). (*Id.* at pp. 20-21). At the hearing, Defendants responded that generally applicable criminal laws cannot provide the basis for a general assertion of "statutory right" under the Supreme Court's qualified immunity analysis.

#### 1. The Statutory Rights at Issue

RICO "creates a civil cause of action for 'any person injured in his business or property by reason of a violation of section 1962.'" *Beck v. Prupis*, 529 U.S. 494, 495, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000) (quoting 18 U.S.C. § 1964(c)).[3]

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[3] Any person found liable for a civil RICO violation is liable for treble damages, costs, and attorneys' fees. 18 U.S.C. § 1964(c); *Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). Plaintiff's Second Amended Complaint also seeks injunctive relief for the alleged civil RICO violations. (Second Am. Compl., at p. 36). Recently, the Supreme Court granted certiorari to resolve the Circuit split on whether private litigants can obtain injunctive relief pursuant to 18 U.S.C. § 1964(c). *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003). However, because of the Supreme Court's

In turn, section 1962 makes it unlawful for any person to engage in "a pattern of racketeering activity" that affects interstate commerce. 18 U.S.C. §§ 1962(c), 1961(4).[4] Racketeering activity includes, among other predicate acts, activity that is indictable under the Hobbs Act and any act involving extortion chargeable under state law. 18 U.S.C. § 1961(1)(A)-(B). A "pattern of racketeering activity" consists of two or more acts of racketeering activity. *Id.* § 1961(5).

The Hobbs Act provides that whoever affects commerce in any way by extortion, or attempts or conspires to do so, may be fined or imprisoned, or both. 18 U.S.C. 1951(a). Extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

The Supreme Court has held that the Hobbs Act adopted the common law definition of extortion under color of official right. *Evans v. United States*, 504 U.S. 255, 263-64, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992). At common law, a public official who obtained the property of another, to which neither the official nor the government office was entitled, was guilty of extortion. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 154 L.Ed. 2d 991 (2003); *United States v. Nardello*, 393 U.S. 286, 289, 89 S.Ct. 534, 21 L. Ed.

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disposition of another issue in the case, it did not reach the merits of this issue.

[4] To establish a civil RICO claim under 18 U.S.C. § 1962(c), the plaintiff must show that the defendants: (1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). Defendants' Motion to Dismiss does not address whether these elements have been satisfied; therefore, the Court will assume, without deciding, that these elements have been satisfied for purposes of this motion.

2d 487 (1969). Further, Congress has explicitly recognized that agents of the United States can be liable for the crime of extortion under the color of official right. 18 U.S.C. § 872; *United States v. Culbert*, 435 U.S. 371, 373, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978).

Under Wyoming law, blackmail constitutes a single offense embracing the separate crimes formerly known as blackmail and extortion. Wyo. Stat. Ann. § 6-2-402(e). A person commits "blackmail if, with the intent to obtain the property of another or to compel action or inaction of any person against his will, the person . . . accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society." Wyo. Stat. Ann. § 6-2-402(a).

### 2. The Hobbs Act and the Wyoming Blackmail Statute as Clearly Established Law

Although it has been unlawful for a person to commit extortion for centuries, Congress first provided individual persons with the right to be free from extortion when it enacted RICO in 1970.[5] RICO defines extortion as a predicate act for which a person engaged in a pattern of racketeering activity may be held liable. 18 U.S.C. §§ 1861, 1862. The Hobbs Act, in turn, defines extortion and makes it unlawful. 18 U.S.C. §

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[5] The first English statute prohibiting extortion, the "First Statute of Westminster," was enacted in 1275. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 845, 841 (1988). The Hobbs Act, which was enacted in 1946, prohibited extortion under the color of official right. *Id.* at 889. When Congress enacted RICO as Title IX to the Organized Crime Control Act of 1970, it provided, for the first time, a statutory mechanism by which a private person injured in "his business or property" could seek redress for extortion committed under the color of official right. *See Pnpis*, 529 U.S. at 496-97, 120 S. Ct. 1608.

1951. The Supreme Court has, on numerous occasions, set forth the common law definition of extortion. *See e.g. Nardello*, 393 U.S. at 289, 89 S. Ct. 534. Similarly, the Wyoming Blackmail statute sets forth what constitutes extortion/blackmail and makes it unlawful. Wyo. Stat. Ann. § 6-2-402.

These general statements of law are capable of giving federal officials fair warning that extortion is unlawful. Therefore, the Court finds that a person's right to be free from extortion is clearly established because the contours of that right are sufficiently evident that a reasonable official would understand that extorting property from a person under the color of official authority would violate that person's rights.

3. Application

A federal employee is entitled to qualified immunity if his conduct was objectively reasonable in light of the clearly established rights at issue. Taking Plaintiff's well-pleaded allegations as true, Defendants Vessels, Barnes, Wilkie, Leone, Shryack, Merrill, Stimson, and Miller engaged in a pattern of racketeering activity, *i.e.*, extortion, under the color of official right in an attempt to force Plaintiff to grant the BLM an easement. (*See* Second Am. Compl., at ¶¶ 26, 32-34, 37, 43, 63-66, 69, 90). An objectively reasonable BLM employee performing his discretionary functions, in light of the clearly established laws prohibiting extortion, would not have engaged in the activity alleged in Plaintiff's Second Amended Complaint. In other words, assuming Plaintiff's allegations are true, Defendants' actions violated the objective legal reasonableness standard because the unlawfulness of these actions would have been apparent in light of preexisting law.

4. Conclusion

For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's First Claim for Relief, violation of RICO, on the basis of qualified immunity is **DENIED.**

C. Plaintiff's Fourth Amendment *Bivens* Claim.

Plaintiff argues he has a constitutional right to be free from malicious prosecution and abuse of process, which is grounded in the Fourth Amendment right to be free from unreasonable seizures. (Pl.'s Br. in Opp'n, at pp. 39, 43). Therefore, Plaintiff contends that Defendants are not shielded by qualified immunity because they knowingly violated these clearly established constitutional rights. ( *Id.* at pp. 39-49). Defendants respond that Plaintiff is attempting to improperly constitutionalize common law torts and that even if these common law torts could be artfully pled as constitutional claims in a *Bivens* action, such constitutional rights are not clearly established. (Defs.' Br., at pp. 28-37).

1. The Constitutional Rights at Issue

Plaintiff argues that he was seized in violation of the Fourth Amendment and therefore may assert a claim for malicious prosecution and abuse of process to redress this constitutional deprivation. (Pl.'s Opp'n Br., at pp. 39-40, 48). Plaintiff, relying primarily on Justice Ginsburg's concurrence in *Albright v. Oliver*, 510 U.S. 266, 276-81, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), argues that for purposes of the Fourth Amendment a person is seized from the initiation of criminal proceedings against him until those claims are fully adjudicated.[6] (Pl.'s Opp'n Br., at pp. 39-40). This Court disagrees.

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[6] The Fourth Circuit has described this as the "continuing seizure" theory. *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997).

In *Albright*, a plurality of the Supreme Court expressed no view on whether the Constitution permits an assertion of a § 1983 claim for malicious prosecution on the basis of an alleged illegal seizure. 510 U.S. at 275, 114 S. Ct. 807. The Tenth Circuit has, however, recognized the viability of a malicious prosecution claim under § 1983. *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996).[7] In *Meacham*, the Tenth Circuit held that in order to maintain a malicious prosecution claim pursuant to § 1983, a plaintiff must demonstrate a violation of his constitutional right to be free from unreasonable seizures. *Id.* at 1561. However, in *Meacham*, the "seizure issue" was fairly straightforward because the Plaintiff was detained for seven weeks. *Id.* at 1561 n. 5, 1560.[8]

The Tenth Circuit has not, in a published opinion, addressed the issue of whether a seizure has occurred for purposes of the Fourth Amendment when a plaintiff asserting a malicious prosecution claim has not been restrained in his

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[7] Although *Albright* and *Meacham* arose in the context of a § 1983 action, the reasoning in those cases are applicable to a *Bivens* claim because in both a § 1983 action against a state officer and a *Bivens* claim against a federal officer, the plaintiff must prove a violation of a underlying constitutional right. *See Daniels v. Williams*, 474 U.S. 327, 330, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ("in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ."); *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) ("*Bivens* claims allow plaintiffs to recover from individual federal agents for constitutional violations these agents commit against plaintiffs."). Additionally, immunities under § 1983 and *Bivens* claims are identical. *Harlow v. Fitzgerald*, 457 U.S. 800, 809, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

[8] Plaintiff also relies on *Garcia v. Johnson*, No. 94-1360, 1995 WL 492879, 1995 U.S. App. LEXIS 23282 (10th Cir. Aug. 18, 1995) in support of his continuing seizure argument. However, in that case, as in *Meacham*, the "seizure issue" was relatively straightforward because the plaintiff was detained in solitary confinement for approximately nine months. *Id.* at *7.

liberty by detention. However, in affirming a dismissal of a malicious prosecution claim, the Tenth Circuit has explained:

> [Plaintiffs] failed to set forth sufficient evidence showing they were seized for purposes of the Fourth Amendment. Specifically, the only deprivations of liberty sustained by [Plaintiff] Lewis was that he had to attend two trials; and he was fingerprinted in connection with one of the summons. Similarly, the only deprivation of liberty sustained by [Plaintiff] Woodman is that she had to make one, and possibly two, court appearances before the . . . charge was dismissed. Because Lewis and Woodman have not shown they sustained any other deprivations of liberty in connection with their receipt of summonses, they have failed to show they were seized in violation of the Fourth Amendment. *See Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999).

*Lewis v. Rock*, 48 Fed.Appx. 291, 294 (10th Cir. 2002). Hence, it appears the Tenth Circuit has rejected Justice Ginsburg's "continuing seizure" theory.

While the Tenth Circuit did not elaborate on its holding in *Lewis*, its reliance on the First Circuit's decision in *Britton* is instructive. In *Britton*, the First Circuit held that a criminal defendant's voluntary compliance with a summons to appear in court without being arrested, detained, restricted in his travel, or otherwise subject to a deprivation liberty did not constitute a seizure under the Fourth Amendment. 196 F.3d at 30.[9] Similarly, in *Nieves v. McSweeney*, the First Circuit

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[9] The First Circuit also noted "the Second, Third, and Fifth Circuits have concluded that something less than forcible detention will suffice to constitute a seizure." 196 F.3d at 29 (citing *Evans v. Ball*, 168 F.3d 856, 860-61 (5th Cir. 1999); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997)). However, three other Circuits, in addition to the First Circuit, have rejected

held that a plaintiff could not maintain a malicious prosecution action because he was not seized for purposes of the Fourth Amendment when the plaintiff was released on his own recognizance, had to appear before the court on a number of occasions, and ultimately endured a trial. 241 F.3d 46, 54-55. The First Circuit reasoned:

> The very idea of defining commonplace conditions of pretrial release as a "seizure" for Fourth Amendment purposes seems to stretch the accepted meaning of the term. After all, a seizure for Fourth Amendment purposes is generally a discrete event, quintessentially an arrest . . . or at least a physical detention. . . . Thus, seizure jurisprudence traditionally has centered on the initial deprivation of liberty that a seizure of a person entails. Since a seizure is a single act, and not a continuous fact, run-of-the-mill conditions of pretrial release do not fit comfortably within the recognized parameters of the term.

*Id.* at 55 (internal quotation marks, citations, and brackets omitted).

Moreover, the "continuing seizure" theory constitutionalizes the tort of malicious prosecution because every criminal defendant is seized during the pendency of the criminal action against him. *See Daniels v. Williams*, 474 U.S. 327, 332-33, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (warning against constitutionalizing common law torts). If acquitted, a *Bivens* claim or § 1983 action provides the vehicle for every such criminal defendant to assert a cause of action for malicious prosecution against the law enforcement officers who as-

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Justice Ginsburg's "continuing seizure" theory. *See Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (en banc); *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n. 3 (7th Cir. 1996); *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996).

sisted in levying the charges against him. While the Fourth Amendment was drafted to restrict the exercise of arbitrary government action in particular circumstances, *see Albright*, 510 U.S. at 273, 114 S. Ct. 807, it would be inconceivable to assert that the Amendment's drafters contemplated that an accused free on personal recognizance and unrestrained in his liberty was "seized" by the government. *See California v. Hodari D.*, 499 U.S. 621, 624, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (stating that "[f]rom the time of founding to the present, the word 'seizure' has meant a 'taking possession.'").

2. Application

Plaintiff's Second Amended Complaint alleges that the BLM, through the various individual Defendants, convinced the United States Attorney's Office to prosecute him for intentionally interfering with federal employees engaged in the performance of their official duties. (Second Am. Compl. at ¶ 90(s)-(t)). Plaintiff alleges that the he was charged without probable cause for forcibly impeding or interfering with a BLM officer in violation of 18 U.S.C. § 111. (*Id.* at ¶¶ 160-164).

On August 18, 1997, the government issued a summons for Plaintiff. Plaintiff voluntarily responded to that summons and was never placed under arrest. In responding to the summons, Plaintiff was "fingerprinted and booked." (*Id.* at ¶ 141). On September 8, 1997, Plaintiff was released on his own recognizance. Plaintiff was not required to post bond nor were any other restrictions placed on his liberty, other than being required to appear for court. Plaintiff made several court appearances before trial. Plaintiff then had a three-day jury trial and was acquitted. (*Id.* at ¶ 167).

Importantly, Plaintiff has not alleged that he was restrained in his liberty in any manner other than being sum-

moned, charged, fingerprinted, booked, and taken to trial. After being fingerprinted and booked, Plaintiff was released on his own recognizance without any restrictions on his liberty. The Tenth Circuit, along with other courts, has held that this is insufficient to constitute a seizure for purposes of the Fourth Amendment. *See Lewis*, 48 Fed. Appx. at 294; *McSweeney*, 241 F.3d at 54-56. Thus, because Plaintiff has not alleged any other deprivation of liberty in connection with his receipt of the summons, he has failed to allege that he was seized in violation of the Fourth Amendment. This Court, like the Supreme Court, does "not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words . . . as [Plaintiff] urges." *Hodari D.*, 499 U.S. at 627, 111 S. Ct. 1547. Hence, Plaintiff has no basis to maintain his malicious prosecution or abuse of process claims under *Bivens* because he was not illegally seized in violation of the Fourth Amendment.

3. Conclusion

Having concluded that Plaintiff's constitutional right to be free from illegal seizure was not violated, the Court need not address the qualified immunity issue. *Taylor*, 82 F.3d at 1564; *McSweeney*, 241 F.3d at 53. However, as the discussion above makes clear, even if the Court adopted Plaintiff's "continuing seizure" theory, that theory of a constitutional seizure is not clearly established. For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's Fourth Amendment *Bivens* claim is **GRANTED**.

D. Plaintiff's Fifth and Fourteenth Amendment *Bivens* Claims

Plaintiff argues he has a constitutional right to control and dispose of his property, which is guaranteed by the Due Process Clause of the Fifth Amendment. (Second Am. Compl. at 176-79). Plaintiff contends that these rights are

clearly established and therefore Defendants are not entitled to qualified immunity. (Pl.'s Br. in Opp'n, at pp. 46-48). Defendants respond that Plaintiff cannot base his *Bivens* claims on conclusory, vague, and general allegations of a constitutional deprivation. (Defs.' Br., at pp. 35-36).

1. The Constitutional Rights at Issue

Plaintiff argues that he has a Fifth Amendment right to the quiet use and enjoyment of his property, to control his property, and to exclude persons from his property. (Pl.'s Br. in Opp'n, at p. 43-44). Plaintiff argues that Defendants violated this right by: (1) denying him procedural due process; (2) violating his substantive due process rights; and (3) retaliating against him for exercising his right not to grant the BLM an easement. (Pl.'s Opp'n Br., at pp. 43-44).

In relevant part, the Fifth Amendment provides that no person shall be deprived of property without due process of law. U.S. Const. amend. V. The Supreme Court has held that the "right to exclude" others from private property is a "fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). The Supreme Court has also hinted that this property right includes the concomitant right to be free from extortion by governmental officials. *See Dolan v. Tigard*, 512 U.S. 374, 388, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

a. Plaintiff's Procedural Due Process Claim

Plaintiff argues that the alleged extortion by Defendants violated his procedural due process rights under the Fifth Amendment. (Pl.'s Opp'n Br., at p. 43; Second Am. Compl., at ¶ 176). In the context of a *Bivens* claim, to state a claim for a procedural due process violation, a plaintiff must allege that

the government officials: (1) intentionally or recklessly, (2) deprived plaintiff of his property, and (3) there is no adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); *Burton-Bey v. United States*, 100 F.3d 967, 1996 WL 654457, (10th Cir. 1996).

Plaintiff's procedural due process claim fails for two reasons. First, Plaintiff has not alleged that he was deprived of his property. Although the definition of deprivation under the Due Process Clause is somewhat elastic, at a minimum it connotes a loss. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-79, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Plaintiff is arguing that Defendants, through various extortionate tactics, attempted to deprive him of his right to exclude others (*i.e.*, the BLM and its employees) from his property. However, as Plaintiff's Second Amended Complaint makes clear, he succeeded in excluding Defendants from his property. (*See* Second Am. Compl., at ¶ 66). At most, Plaintiff has alleged a state law trespass to land cause of action. However, trespass does not become a violation of the Fifth Amendment simply because it was committed by a federal official. *See Daniels v. Williams*, 474 U.S. 327, 332-33, 106 S.Ct. 662, 88 L. Ed. 2d 662 (1986). Absent a deprivation of a property interest, no procedure is required by the Due Process Clause. *Watson v. Univ. of Utah Med. Center*, 75 F.3d 569, 578 (10th Cir. 1996).

Second, even if Plaintiff was deprived of a property interest, he has not alleged the absence of an adequate post-deprivation remedy. Plaintiff argues that the deprivation and absence of procedural due process occurred because of the alleged extortionate acts committed by Defendants. (Pl.'s Br. in Opp'n, at p. 43). However, as outlined above, RICO provides a private cause of action to remedy extortionate acts committed under the color of law. 18 U.S.C. §

1964. Alternatively, Plaintiff could have brought an action under Wyoming law for damages to his property arising out of the alleged trespasses. *See Hudson*, 468 U.S. at 535, 104 S. Ct. 3194; *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 859 (2002) (outlining requirements to state a claim for trespass to land).

Plaintiff has failed to show that he was deprived of a protected property interest or that he did not have an adequate post-deprivation remedy. Thus, Plaintiff failed to carry his burden of demonstrating that Defendants violated a clearly established right for purposes of qualified immunity. *Watson*, 75 F.3d at 578.

b. Substantive Due Process Claim

Plaintiff argues that his substantive due process rights were violated because the alleged extortion by Defendants constituted a deliberate on-going abuse of executive discretion that shocks the conscience. (Pl.'s Br. in Opp'n, at p. 44). As noted above, the Fifth Amendment prohibits deliberate decisions by governmental officials to deprive a person of property without due process of law. U.S. Const. amend. V; *Williams*, 474 U.S. at 330, 106 S. Ct. 662.

The Supreme Court has repeatedly emphasized that the touchstone of due process is to protect against arbitrary government action. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). The substantive due process guarantee protects against government power being used for purposes of oppression. *Williams*, 474 U.S. at 331, 106 S. Ct. 662. In a case challenging executive action on substantive due process grounds, "the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n. 8, 118 S. Ct. 1708. Conduct by an executive officer can be

said to shock the contemporary conscience when it is deliberately inflicted for the purpose of causing injury without any justifiable governmental interest. *Id.* at 849, 118 S. Ct. 1708; *see also Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (holding that the involuntary pumping of an individual's stomach to obtain evidence shocks the conscience). The Supreme Court has explained that the ultimate determination of whether executive action shocks the conscience is determined by the totality of the circumstances; however, the Court has repeatedly adhered to *Rochin* 's benchmark. *Id.* at 847, 850, 118 S. Ct. 1708.

Turning to the circumstances of this case, and keeping in mind the Supreme Court's reluctance to expand the concept of substantive due process and desire to preserve the constitutional proportions of constitutional claims, this Court is unable to conclude that any of the alleged conduct by Defendants violated Plaintiff's substantive due process rights. *See id.* at 842, 847 n. 8, 118 S. Ct. 1708. Stripping the verbiage from Plaintiff's Second Amended Complaint, he has alleged that Defendants: (1) failed to grant him flexibility in his grazing operations by not following the High Island Ranch Allotment Management Plan; (2) cancelled a right-of-way across federal land; (3) instigated disputes between Plaintiff and his neighbors; (4) frivolously prosecuted Plaintiff for livestock trespass; (5) threatened Plaintiff by telling him not to butt heads with the BLM or things would get ugly and come to war; (6) trespassed on his property; (7) subjected Plaintiff to a surprise interrogation; and (8) convinced the United States Attorney's Office to prosecute Plaintiff. (Second Am. Compl., at ¶¶ 39, 40, 41, 43, 45-56, 70-73, 90).

These allegations are not of conduct that is "arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846, 118 S. Ct. 1708 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L.Ed. 2d 261 (1992)) (internal quotation

marks omitted). Plaintiff's allegations, viewed in the light most favorable to him, indicate that he was inconvenienced and suffered minimal harm by Defendants' conduct; however, the Supreme Court has "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state [or federal] authority causes harm." *Id.* Rather, the alleged executive actions must violate the decencies of civilized conduct and interfere with rights implicit in the concept of ordered liberty. *Id.* at 847, 118 S. Ct. 1708. Plaintiff's allegations, while unfortunate, do not involve acts that constitute an abuse of power that can be condemned as conscience shocking. *Id.* at 850, 118 S. Ct. 1708.

Plaintiff has failed to allege facts that demonstrate he was deprived of his substantive due process guarantees. Thus, Plaintiff failed to carry his burden of demonstrating that Defendants violated a clearly established right for purposes of qualified immunity. *Watson*, 75 F.3d at 578.

c. Plaintiff's Unconstitutional Retaliation Claim

Plaintiff has alleged that he was retaliated against for exercising his constitutional right to control, and exclude others from, his private property. (Second Am. Compl., at ¶¶ 171, 177). Defendants did not address this allegation.

The Constitution protects the right to exclude others from private property. *See Kaiser Aetna*, 444 U.S. at 179-80, 100 S. Ct. 383. The Tenth Circuit has held that an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983, and hence in a *Bivens* action. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). Although retaliation is not expressly referenced in the Constitution, it is nonetheless actionable because retaliatory actions may tend to chill the exercise of constitutional rights. *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001).

To state a claim for unconstitutional retaliation, a plaintiff must allege: (1) exercise of a constitutionally protected right; (2) retaliatory actions by governmental officials in response to the exercise of that constitutional right; and (3) more than a "theoretical injury." *Id.* at 960-61. With respect to the third element, the plaintiff need not allege "actual injury" resulting from the retaliation; rather, it is sufficient that the plaintiff allege that the retaliatory acts would chill a person of ordinary firmness from continuing to engage in the constitutionally protected activity. *Id.*

Plaintiff has alleged that several actions were taken against him after he refused to grant the BLM an easement and exercised his right to exclude others from his property. (*See* Second Am. Compl., at ¶¶ 39, 40, 41, 43, 45-56, 70-73, 90). For example, Plaintiff alleges that Defendant Vessels cancelled his right-of-way across federal land after he refused to grant the BLM an easement. (*Id.* at ¶ 40). If true, these allegations indicate that Defendants took action against Plaintiff in retaliation for exercising his property rights. Although it does not appear that Plaintiff suffered any actual injury from the allegations, that does not preclude Plaintiff's retaliation claim. *See Poole*, 271 F.3d at 961.

2. Whether the Right to Be Free From Unconstitutional Retaliation was Clearly Established.

Plaintiff argues that the right to be free from unconstitutional retaliation based upon the exercise of a fundamental property right, such as the right to exclude, is clearly established. (Pl.'s Opp'n Br., at p. 47). In *DeLoach*, the Tenth Circuit held that the unlawful intent inherent in retaliation for the exercise of a constitutional right places the retaliatory action "beyond the scope of qualified immunity if the right retaliated against was clearly established." 922 F.2d at 620.

As noted above, the Supreme Court has held that the right to exclude others from private property has universally been held to be a fundamental element of the property right. *Kaiser Aetna*, 444 U.S. at 179-180, 100 S. Ct. 383. Property interests, although drawn from state law, are protected by the Constitution. *Chavez v. City of Santa Fe Housing Auth.*, 606 F.2d 282, 284 (10th Cir. 1979). These property interests are not limited to a few rigid technical forms; rather, "property denotes a broad range of interests that are secured by existing rules or understandings." *Id.* (quoting *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)) (internal quotation marks omitted). The Court concludes that the universally accepted "right to exclude" is a clearly established right protected by the Constitution.

3. Application

Plaintiff has alleged that he attempted to exclude Defendants from his property on numerous occasions and that in response, Defendants retaliated against him for exercising that property right. (Second Am. Compl. at ¶¶ 26, 34, 37, 40, 90, 150, 171). As a result, because this Court concludes that the "right to exclude" is was clearly established, the "unlawful intent inherent in such retaliatory action places it beyond the scope of a [federal] officer's qualified immunity . . . ." *DeLoach*, 922 F.2d at 620.

4. Conclusion

Defendants' Motion to Dismiss Plaintiff's procedural and substantive due process *Bivens* claims under the Fourteenth Amendment is **GRANTED**. Defendant's Motion to Dismiss Plaintiff's unlawful retaliation *Bivens* claim under the Fifth Amendment is **DENIED**.

***Conclusion***

The necessity of federal officials working to protect the Nation's land and resources is self-evident. In performing those functions, federal officials must be given substantial latitude and discretion to protect the government's interests. *See Lewis*, 523 U.S. at 857-58, 118 S. Ct. 1708. These discretionary functions are, however, subject to the primacy of interest in property which the Constitution and Acts of Congress seek to protect. *Id.* And therein lies the perennial tension that arises under our Constitution in a suit such as this between the governed and the governors. *See Williams*, 474 U.S. at 332, 106 S. Ct. 662.

This Rule 12(b)(1) and 12(b)(6) Motion has tested the formal sufficiency of Plaintiff's claim for relief. As such, this Court has limited its analysis to the pleadings, which contain facts the Plaintiff may or may not be able to prove at trial. This case, which has been on the docket for nearly five years now, should go forward. As discussed at the hearing, Defendants shall file an Answer in accordance with Fed. R. Civ. P. 12(a). In further motions before the Court, the parties should set forth the facts and claims as to each Defendant sued in his individual capacity.

For the aforementioned reasons, Defendants' Motion to Dismiss Plaintiff's Second Amended Claim is **DENIED** as to Plaintiff's: (1) First Claim for Relief, violation of RICO; and (2) unconstitutional retaliation claim under *Bivens*. Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint is **GRANTED** as to Plaintiff's *Bivens* claims: (1) alleging a violation of the Fourth Amendment; and (2) alleging a violation of procedural and substantive components of the Due Process Clauses of the Fifth and Fourteenth Amendments.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-8037

HARVEY FRANK ROBBINS, PLAINTIFF-APPELLANT

*v.*

CHARLES WILKIE, JOE VESSELS, DARRELL BARNES, TERYL SHRYACK, PATRICK MERRILL, DAVID STIMSON, MICHAEL MILLER, GENE LEONE, AND JOHN DOES 1 THROUGH 20, DEFENDANTS-APPELLEES

Aug. 21, 2002

Before EBEL and MCKAY, Circuit Judges, and SAM,[1] Senior District Judge.

MCKAY, Circuit Judge.

Appellant Robbins appeals the District of Wyoming's grant of Defendants' Rule 12(b)(6) Motion to Dismiss Appellant's RICO and *Bivens* claims. We review a Rule 12(b)(6) dismissal *de novo*, accepting as true all allegations in the complaint and construing them in a manner favorable to the non-moving party. *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001).

[1] Honorable David Sam, United States Senior District Judge for the District of Utah, sitting by designation.

## I. Background

Appellant owns real property, Bureau of Land Management preference rights, and livestock grazing permits. As owner of the High Island Ranch, Appellant operates a guest ranching operation in conjunction with his cattle ranching activities. Before Appellant purchased the ranch in 1994, his predecessor-in-interest granted a non-exclusive easement to the BLM. However, the BLM failed to properly record the easement and Appellant was unaware of its existence at the time of purchase. Thus, when Appellant recorded his title to the ranch, the BLM's easement was extinguished.

Appellant alleges that BLM employees indulged in various forms of extortion in an attempt to force Appellant to regrant the easement BLM had lost. He also alleges that Defendants conspired to bring criminal charges they knew were without merit against him. Appellant was acquitted of the criminal charges after a jury trial. He also alleges that one of the Defendants threatened to cancel Appellant's right-of-way across BLM land. Without this right-of-way, Appellant would experience significant difficulties operating his guest ranch.

Appellant brought RICO and *Bivens* claims against Defendants. The district court granted Defendants' Rule 12(b)(6) motion on Appellant's RICO claims based on its holding that Appellant failed to adequately plead damages. The court also dismissed Appellant's *Bivens* claim pursuant to Rule 12(b)(6) holding that other available remedies precluded that claim. Because the court held that Appellant was without standing to bring a RICO claim and had not made a cognizable *Bivens* claim, it failed to reach the issue of qualified immunity. However, it opined that it was "inclined to believe that the Defendants" were protected by qualified immunity. Aplt. App. at 118.

In reviewing a district court's grant of a Rule 12(b)(6) motion, "all well-pleaded factual allegations in the . . . complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (citation omitted). We recognize that "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (quotation omitted).

## II. RICO claim

To successfully state a RICO claim, a plaintiff must allege four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985); *BancOklahoma Mortgage Corp. v. Capital Title Co. Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). The district court specifically held that for purposes of a Rule 12(b)(6) motion Appellant sufficiently pled all four RICO elements.

However, the district court granted Defendants' Rule 12(b)(6) motion on Appellant's RICO claim based on Appellant's failure to prove standing. Plaintiffs who bring civil RICO claims pursuant to 18 U.S.C. § 1962 must show damage to their business or property as a result of defendants' conduct. *See Sedima*, 473 U.S. at 496 (RICO plaintiff only has standing if "he has been injured in his business or property by the conduct constituting the violation"). Because Appellant failed to allege any tangible harm to his business or strict court held his RICO claim "nonviable." Aplt. App. at 116.

We cannot agree with the district court that Appellant "absolutely failed to carry his burden of pleading any harm to business or property as a result of the alleged RICO viola-

tion." *Id.* There are several references to business or property damage which allegedly resulted from Defendants' activities. Examples include allegations that various Defendants took actions that adversely affected his business, caused resource damage, interfered with guest ranch operations, caused grievous economic injury, economic loss, and property damage. *See id.* at 33-34, 37, 48. Such allegations are sufficient to show standing, especially at this stage of the litigation.

In *NOW v. Scheidler*, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the Supreme Court stated, "We have held that at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) In *NOW*, the plaintiffs alleged that the RICO conspiracy "ha[d] injured the [plaintiffs'] business and/or property interests. . . ." *Id.* (internal quotations omitted). The Court concluded that "[n]othing more is needed to confer standing on [plaintiffs] at the pleading stage." *Id.*

Defendants insist that RICO plaintiffs must plead damages with particularity. Both Supreme Court precedent and the Federal Rules of Civil Procedure foreclose the adoption of Defendants' position. *See id.*; Fed.R.Civ.P. 8 (pleading requires short and plain statements meant to give notice to defendants); *see also* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. on Legis. 1, 18-22 (1993) (criticizing several attempts at RICO reform through judicial revisionism including improper heightened pleading requirements). Defendants confuse the requirement to plead with particularity RICO acts predicated upon fraud pursuant to Rule 9(b) with

Rule 8's more general notice pleading typically required of all litigants. *See, e.g., Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the predicate RICO acts of mail and wire fraud).

Following the direction of the Supreme Court, we hold that at the pleading stage of civil RICO actions, a plaintiff must plead damages to business or property in a manner consistent with Rule 8 to show standing and is not required to plead with the particularity required by Rule 9(b). *See NOW*, 510 U.S. at 256. Accordingly, we reverse the district court's grant of Defendants' Motion to Dismiss Appellant's RICO claim.

### III. *Bivens* claim

The district court granted Defendants' Motion to Dismiss Appellant's *Bivens* claim holding that the availability of remedies under the Administrative Procedures Act and the Federal Tort Claims Act precluded Appellant's *Bivens* cause of action. Aplt.App. at 117-18. *Bivens* claims allow plaintiffs to recover from individual federal agents for constitutional violations these agents commit against plaintiffs. *See Bivens v. Six-Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

The Supreme Court has held that a plaintiff's ability to pursue a *Bivens* claim is precluded in two specific instances. *See Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). *Bivens* claims are precluded when defendants can demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress," or when defendants can prove "that Congress has provided an alter-

native remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* (quotations omitted) (emphasis in original).

The district court's grant of Defendants' Motion to Dismiss is apparently predicated upon the second exception-the existence of alternative remedies that Congress has explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. Specifically, the district court held that the APA and the FTCA precluded Appellant's *Bivens* claim. However, Appellant is not claiming injury resulting from agency action or an agency decision. Nor is Appellant claiming that Defendants violated his constitutional rights while implementing agency action. Appellant claims instead that the individual Defendants' intentional acts unrelated to any agency decision violated his constitutional rights.

The APA is the proper avenue for reviewing an agency's action or decision. If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a *Bivens* action would not be available. *See e.g., Schweiker v. Chilicky*, 487 U.S. 412, 414, 429, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988) (*Bivens* action unavailable to contest alleged constitutional violations committed by individual agency employees in deciding to terminate Social Security disability benefits); *Zephyr Aviation, L.L.C. v. Dailey*, 247 F.3d 565, 572 (5th Cir. 2001) ("[P]arties may not avoid administrative review simply by fashioning their attack on an [agency] decision as a constitutional tort claim against individual [agency] officers."); *Nat. Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1532 (10th Cir. 1994) (*Bivens* claim unavailable for alleged constitutional violations of individual agency officers in making wrongful jeopardy tax assessments). However, the

APA contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action. Because Appellant cannot hold Defendants personally liable for allegedly violating his constitutional rights under the APA, the APA is an ineffective remedy. In this case, the APA does not preclude Appellant's *Bivens* claim.

The district court's reliance on *Chilicky*, *supra*, is unfounded. *Chilicky* is distinguishable because it involved a challenge to the method in which various officials implemented the Social Security Benefits Program for disabled individuals. In that case, the Supreme Court held that the proper remedy was the administrative appeals system. *Chilicky*, 487 U.S. at 423-29. The appeals system had been set up specifically to deal with a dispute over an individual's entitlement to disability benefits. *See id.* at 424-26.

Not all of Appellant's allegations serving as a basis for his *Bivens* claim involve individual action leading to final agency decisions reviewable pursuant to the APA. For example, Appellant's allegations that some Defendants denied him certain rights pursuant to his management plan is properly challenged in an administrative proceeding. Therefore, a *Bivens* claim for that particular allegation is precluded. However, several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim. *See, e.g., Zephyr Aviation*, 247 F.3d at 572-573 (recognizing potential of *Bivens* action for "extra-procedural and unconstitutional actions by FAA inspectors," while acknowledging that a *Bivens* action would be unavailable to challenge the FAA's attachment of condition notice to company's airplane); *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1158-59 (9th Cir. 2000) (Reinhardt, J., concurring) (*Bivens* remedy not available when result of individual

agency employees' constitutional violations is an erroneous tax assessment, but permitting *Bivens* remedy for First Amendment cases involving IRS harassment); *Collins v. Bender*, 195 F.3d 1076, 1079-80 (9th Cir. 1999) (permitting *Bivens* action for improper search of plaintiff's home by individual government agents while recognizing that *Bivens* action generally unavailable for constitutional violations committed by agency employees in taking personnel actions pursuant to the Civil Service Reform Act).

Neither can Appellant's *Bivens* claim be precluded by potential claims under the FTCA. We have specifically held that the FTCA and a *Bivens* claim are alternative remedies.

When a federal law enforcement officer commits an intentional tort, the victim has two avenues of redress: 1) he may bring a *Bivens* claim against the individual officer based on the constitutional violation, or 2) he may bring a common law tort action against the United States pursuant to the FTCA. These are *separate and distinct causes of action arising out of the same transaction.*

*Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994) (citation omitted) (emphasis added). This statement is also consistent with Supreme Court holdings. "Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [plaintiffs] exclusively to the FTCA remedy." *Carlson*, 446 U.S. at 23. Thus, the existence of a potential FTCA claim is an insufficient basis for the district court to preclude Appellant's *Bivens* claim.

We hold that Appellant's allegations that Defendants violated his constitutional rights through conduct unrelated to final agency decisions appealable pursuant to the APA are sufficient to state a cognizable *Bivens* claim. Because some of Appellant's *Bivens* claims are not precluded by either the

APA or the FTCA, we reverse the district court's grant of Defendants' Rule 12(b)(6) Motion to Dismiss Appellant's *Bivens* claim.

## IV. Conclusion

We REVERSE and REMAND to the district court for further disposition in a manner consistent with this opinion.

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 04-8016

HARVEY FRANK ROBBINS, JR., PLAINTIFF-APPELLEE

*v.*

CHARLES WILKIE, ET AL., DEFENDANTS-APPELLANTS

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PACIFIC LEGAL FOUNDATION, ET AL.,
AMICI CURIAE

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Filed: Mar. 14, 2006

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**ORDER**

Before: KELLY, HENRY, and MURPHY, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

The Motion to File Brief of Amici Curiae National Wildlife Federation, Public Lands Foundation and Wyoming Wildlife Federation is denied.

Entered for this Court
ELISABETH A. SCHUMAKER, Clerk

By: L. FABRIZIO
L. FABRIZIO
Deputy Clerk

(2)

No. 06-219

Supreme Court, U.S.
OCT 25 2006
CLERK

IN THE

# Supreme Court of the United States

Charles Wilkie et al.,

*Petitioners,*

v.

Harvey Frank Robbins

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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## QUESTIONS PRESENTED

1. Whether government officials can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., of the predicate act of extortion under color of official right when they engage in otherwise lawful actions with an intent to extort a right-of-way from a private citizen for the benefit of the government, rather than with an intent to merely carry out their regulatory duties, and if so whether that statutory prohibition was clearly established under the facts of this case.

2. Whether respondent's *Bivens* claim based on the exercise of his Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 et seq., or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established under the facts of this case.

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## STATEMENT OF THE CASE

Petitioners seek certiorari to review an interlocutory order addressing what they describe as novel questions of law arising from an unusual dispute over easements on federal and private lands.

1. Respondent Harvey Frank Robbins is the owner of the High Island Ranch, a cattle and guest ranch in Hot Springs County, Wyoming. Pet. App. 2a. From 1987 through 1994, the United States Bureau of Land Management (BLM) sought to acquire the ranch, or at least an easement across it, apparently to secure public access to the nearby Shoshone National Forest. Appellee's Supplemental App. at 574-609, *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006) (hereinafter Appellee's Supplemental App.). During that time, the ranch was owned by respondent's predecessor-in-interest, George Nelson. Petitioners, employees of the BLM, persuaded Nelson to grant the Government a road easement in 1994. Pet. App. 2a. The easement was a long-term property interest, allowing the BLM to use and maintain the road both for its own use and for the use of its assigns. Appellee's Supplemental App. 619-20.

In exchange for the easement, the BLM granted Nelson a more limited right-of-way to use the same road as it passed over federal property. Appellee's Supplemental App. 634. Unlike the easement, the right-of-way required Nelson to pay the BLM a "fair market value rental," *id.*, and limited Nelson's use and maintenance of the road, *id.* at 634-36. For example, while the easement given to the BLM allowed the Government to permit mining companies to use the road to reach federal land, the right of way did not permit Nelson to use the road for that purpose. *Id.* at 636. Nelson timely recorded his right-of-way, but for reasons undisclosed in the record, the BLM failed to record its easement. Pet. App. 2a.

Unaware of the unrecorded easement, respondent purchased the property and recorded the warranty deed, thereby extinguishing the BLM's unrecorded easement. *Id.* at

2a. Upon learning of their mistake, petitioners demanded that respondent give them the easement without compensation and when he refused, they commenced a campaign of threats, harassment and intimidation designed to coerce him into relinquishing his right to exclude the Government from his private property. *Id.* at 2a-3a. Among other things, petitioners brought unfounded criminal charges against respondent, trespassed on his property, cancelled his special recreation use permit and grazing privileges, interfered with his guest cattle drives, refused to maintain the road providing access to his property, and threatened to cancel, and then did cancel, his right-of-way across federal lands. *Id.* at 3a. The net result was the complete destruction of respondent's business.

The purpose of these actions was clear. Former BLM range conservationist Edward Parodi testified that petitioner Leone boasted to him and to other BLM employees on a "daily" basis that he wanted to "get [Robbins's] permits and get him out of business" and that this hostile attitude was shared by other petitioners. Appellee's Supplemental App. 165-166. Parodi also testified that "the attitude just got worse and worse and worse towards Mr. Robbins, and pretty soon I was being asked to do things that I . . . shouldn't have been authorized to do." *Id.* at 163. Parodi eventually resigned and later explained that "I didn't think I could do the job any longer . . . . It's one thing to go after somebody that is willfully busting the regulations and going out of their way to get something out of the government. I only saw Mr. Robbins as a man standing up for his rights for his property." *Id.* at 173-74, 242.

2. After enduring many years of abuse, respondent sued petitioners in their individual capacities. Among other things, respondent alleged that petitioners had engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Respondent also sought relief pursuant to

*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his Fifth Amendment right to exclude the Government from his property in the absence of a proper taking and just compensation. Pet. App. 1a-2a.[1]

The district court initially granted petitioners' motion to dismiss on the grounds that respondent had failed to plead damages under RICO, and that his *Bivens* claim was precluded by the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 (2006), and the Federal Tort Claims Act (FTCA). *Id.* at 3a. On appeal, the Tenth Circuit reversed. *Id.* at 76a-84a. It held that respondent adequately pled a variety of damages in his RICO count. *Id.* at 79a-80a. The court further held that neither the APA nor the FTCA precluded his *Bivens* claim. *Id.* at 83a-84a. The court agreed with petitioners that if respondent "attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a *Bivens* action would not be available." *Id.* at 81a (citation omitted). However, the court rejected the assertion that the APA precluded respondent's Fifth Amendment claim entirely. The court noted that "the APA contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action." *Id.* at 81a-82a. In this case, the court held, "several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim." *Id.* at 82a. The court did not, however, determine which allegations were precluded and which could go forward, leaving that task for the district court. *See id.* at 25a-26a.

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[1] Respondent also claimed additional violations of his rights under the Fourth, Fifth, and Fourteenth Amendments, but those claims are not at issue here. Pet. App. 3a-4a.

On remand, petitioners did not ask the district court to decide which of respondent's allegations on the Fifth Amendment count were precluded by the APA. *Id.* at 26a. Instead, petitioners moved to dismiss on qualified immunity grounds. *Id.* at 55a. The district court denied the motion in relevant part, holding that the complaint adequately pled violations of clearly established rights under RICO and the Fifth Amendment. *Id.* at 58a-62a, 72a-74a. Petitioners did not appeal. Instead, petitioners engaged in discovery, *see id.* at 38a, and nine months later, moved for summary judgment, re-asserting their defense of qualified immunity, *id.* at 33a. The district court denied the motion, concluding that respondent had substantiated the allegations in his complaint. *Id.* at 48a. Faced then with the same facts as it had assumed in ruling on the motion to dismiss, the district court held that its earlier legal determination – that the rights violated were "clearly established" – was law of the case and denied the motion for summary judgment. *Id.* at 36a-39a.

3. Petitioners appealed again, and the Tenth Circuit affirmed. *Id.* at 26a. The court first recognized the "Fifth Amendment right to exclude the government from one's private property" as "'a fundamental element of the property right.'" *Id.* at 12a (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979)). The court concluded that "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. "Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power." *Id.* at 14a. The court further concluded that petitioners' actions in this case violated that clearly established constitutional right: "If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government and government officials will be more inclined to obtain private property by means outside the Takings Clause.

The constitutional right to just compensation, in turn, would become meaningless." *Id.* at 14a-15a.

The court also rejected petitioners' assertion of qualified immunity to respondent's RICO claims. The court noted that petitioners "do not contest" that respondent "sufficiently alleged Defendants engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402." *Id.* at 17a. Instead, petitioners argued that "[b]ecause [they] had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, . . . their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law." *Id.* The court rejected this assertion as based on a fundamental mischaracterization of respondent's claim:

> Robbins does not allege that Defendants committed extortion by attempting to obtain a right-of-way. Rather, he alleges Defendants' other actions, including refusing to maintain the road providing access to Robbins' property, cancelling Robbins' special recreation use permit and grazing privileges, bringing unfounded criminal charges against Robbins, trespassing on Robbins' private property, and interfering with Robbins' guest cattle drives, were all committed in an attempt to coerce Robbins into granting BLM a right-of-way.

*Id.* The court noted that although petitioners claimed generally that all of their conduct was within their lawful regulatory authority, they did "not enumerate specific regulatory provisions permitting each of their actions." *Id.* The court explained that even if petitioners had a general legal right to require respondent to provide an easement in exchange for his right-of-way across federal land, they could not achieve that lawful end through the unlawful means of extortion. *Id.* at 18a-20a. The court then rejected petitioners'

claim that their conduct was not extortionate, but simply aggressive exercise of their lawful regulatory authority. That claim, the court held, depended on disputed questions of fact that could not be resolved on summary judgment. *Id.* at 21a. The court also held that petitioners' conduct independently violated Wyoming's extortion statute. *Id.* at 22a-25a.

Finally, the court rejected petitioners' argument that the APA precluded respondent's *Bivens* claim. The Court noted its prior holding in the first appeal that the APA precluded respondent's Fifth Amendment claim only to the extent it was based on "individual action leading to a final agency decision." *Id.* at 25a. The court then declined petitioners' request that it "determine which allegations remain and which are precluded," explaining that "Defendants did not raise this issue in their motion for summary judgment." *Id.* at 25a-26a.

## REASONS FOR DENYING THE WRIT

Petitioners seek review of an interlocutory decision addressing legal questions that, by their own acknowledgment, rarely arise in the normal operation of the Government's land management programs. Petitioners do not assert that the court of appeals's decision gives rise to any significant, much less sustained, conflict among the circuits. And, in fact, even the shallow division of authority they allege is illusory. Rather than deciding any broad question of general legal significance, the decision below narrowly addressed the peculiar facts of this unusual case and reached a result which, while plainly correct, will have no broader or recurring significance. Indeed, nothing in the decision threatens the legitimate regulatory authority of federal land management officials who have long managed to resolve disputes with local landowners without resort to the tactics employed in this case. Finally, even if the court of appeals's holdings were worthy of this Court's review, the current interlocutory posture of this case makes review at this time inadvisable, raising substantial jurisdictional impediments

that could preclude this Court from ever reaching at least one of the questions presented. The petition should be denied.

## I. The Tenth Circuit's Interlocutory Ruling On Respondent's RICO Claim Does Not Warrant Review By This Court.

Petitioners first ask this Court to decide whether a plaintiff may state a claim under RICO by alleging that "government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government." Pet. 13. That question is not the basis of any circuit conflict and, in any event, does not actually arise on the facts of this case. Moreover, the decision below is correct, simply applying the settled principle that the abuse of otherwise lawful authority for extortionate purposes violates the Hobbs Act and RICO.

### A. The Decision Below Implicates No Division Of Authority.

Petitioners assert that the decision below conflicts with one decision of one other court of appeals, *Sinclair v. Hawke*, 314 F.3d 934 (8th Cir. 2003). *See* Pet. 15-16. That assertion is incorrect and, even if it were not, review of such a nascent and shallow split would be premature at this time.

In *Sinclair*, federal bank regulators took escalating action against a bank, ultimately declaring the bank insolvent and appointing a statutory receiver. 314 F.3d at 937-38. The bank brought a civil RICO claim, alleging that the regulators conspired to use their authority to "prevent minority and low-income borrowers from having access to credit." *Id.* at 939. The Eighth Circuit held that this did not state a violation of RICO because "Mr. Sinclair has cited no authority for the proposition that federal employees who take regulatory action consistent with their statutory powers engaged in a 'pattern of racketeering activity' if those actions are adverse to a particular industry or business activity." *Id.* at 943.

That conclusion was both correct and entirely inapplicable to this case. As the Eighth Circuit observed, "regulators do not become racketeers by acting like aggressive regulators." *Sinclair*, 314 F.3d at 944. Instead, RICO requires proof that the challenged conduct actually violated one of a list of predicate statutes, such as the Hobbs Act. 18 U.S.C. § 1961(1) (2006). Although the plaintiff in *Sinclair* alleged that the defendants' conduct was unfair, and potentially discriminatory, it did not allege that the regulators had engaged in "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance," or any other RICO predicate act. *Id.* At most, the plaintiff alleged a form of racial discrimination, but discrimination is not an act of racketeering. *Id.* By contrast, in this case the Tenth Circuit concluded that the defendants' conduct violated two RICO predicate statutes, the Hobbs Act and Wyoming's extortion statute. Pet. App. 18a-25a. Although petitioners dispute that their conduct violated the Hobbs Act properly construed, *Sinclair* has nothing to say on that question.

In addition, even if *Sinclair* were read to announce a general rule regarding all RICO claims against government regulators, that rule is plainly restricted to cases in which the defendants' conduct was "consistent with their statutory powers." 314 F.3d at 943. But in this case, the Tenth Circuit held that petitioners would be subject to liability only if they were *not* acting to "carry out their regulatory duties" in filing false criminal charges against respondent, trespassing on his property, and engaging in the various other extortionate acts that form the basis of liability in this case. Pet. App. 18a. *See also infra* 9-11.

Petitioners cannot plausibly claim that any disagreement between the Tenth and Eight Circuits is sufficiently clear and entrenched as to warrant review by this Court at this time. That only two circuits have even arguably weighed in on the question presented is good reason to doubt that the issue is of

recurring importance. Moreover, to the extent the question is sufficiently important to warrant this Court's review at some point, that review could be considerably assisted by awaiting the views of other courts of appeals and clarification of the scope of the rules adopted by the Eighth and Tenth Circuits.

### B. This Case Is A Poor Vehicle For Resolving Any Questions Regarding RICO's Application To The Conduct Of Government Regulators.

Even if petitioners had presented this Court with a question worthy of review, this case presents a particularly poor vehicle for deciding it.

1. Resolving the RICO question petitioners present – *i.e.*, whether government officials "acting pursuant to their regulatory authority" can be held liable for engaging in extortion under color of law under the Hobbs Act, Pet. (I) – will have no effect on the actual disposition of this case. Although the court of appeals assumed for the sake of its decision that petitioners' conduct was authorized in some general sense, the bulk of the challenged conduct was plainly outside the scope of any conceivable authority petitioners may have had. As a result, even if this Court determined that the Hobbs Act applied only to extortionate conduct outside an official's "regulatory authority," petitioners still would not be entitled to qualified immunity.

Petitioners argue that the "basic regulatory activity giving rise to this case" was the lawful act of "attempting to secure a reciprocal right-of-way over private land intermingled with public lands." Pet. 10. But as the Tenth Circuit noted, "Defendants . . . apparently misunderstand Robbins' allegations." Pet. App. 17a. The court of appeals concluded that respondent's claim does not, for example, depend on

petitioners' enforcement of 43 C.F.R. § 2800.0-2[2] to deny his application for a federal right-of-way.[3] Pet. App. 17a. The extortion in this case arises principally from the *other* actions petitioners took – actions *not* authorized by the regulations or any other source of law, such as filing false criminal charges, trespassing on respondent's land, canceling his special use and grazing permits on false pretenses, etc. *See* Pet. App. 17a. Petitioners cannot plausibly claim that such conduct was authorized by their employer as part of the "give and take" of federal land use negotiations. Pet. 11.[4] Indeed, many of

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[2] Unless otherwise indicated, citations to the regulations in this brief refer to the version in effect at the time of the events at issue in this case.

[3] That said, petitioners' revocation of, and subsequent refusal to reinstate, respondent's right-of-way across federal land was *not* authorized. As it stood at the time, the regulation stated that BLM could condition the grant of a federal right-of-way upon the applicant's "grant to the United States [of] an *equivalent* right-of-way that is adequate in duration and rights." 43 C.F.R. § 2801.1-2 (1980) (emphasis added). Contrary to the regulation, the easement petitioners demanded from respondent was not the "equivalent" of the right-of-way that they offered to him. For example, the right of way offered to respondent required annual rental payments while the easement demanded from respondent did not. Appellee's Supplemental App. at 619-620, 633-636. Moreover, the easement demanded by petitioners had only a few minor restrictions, while the right-of-way offered to respondent included several pages of limitations regarding the use and maintenance of the road. *Id.* Thus, while BLM licensees could use the road for mineral extraction purposes, respondent could not. *Id.*

[4] For example, the grazing permit regulations specified a single approved method of securing access to private land under that program – the agency may include the access requirement as part of the grazing lease. 43 C.F.R. 4130.3-2(h). Nothing in the regulations purports to authorize officials to seek an easement through the extortionate methods employed in this case. Moreover, nothing in the regulations permits BLM officials to demand a long-term ease-

petitioners' actions were independently unlawful (*e.g.*, filing false criminal charges and trespassing). Those unauthorized acts are more than a sufficient predicate for respondent's Hobbs Act and RICO claims in this case.

2. Deciding the first question presented will fail to resolve the RICO claim for another reason as well. In addition to holding that petitioners' conduct constituted extortion "under color of official right" under the Hobbs Act, the Tenth Circuit separately held that petitioners conduct violated the Wyoming extortion statute. Pet. App. 22a-25a. The violation of the state statute is an independent and sufficient predicate for respondent's RICO claim. *See* 18 U.S.C. § 1961(1). Petitioners do not, however, seek review of the Tenth Circuit's construction of state law. *See* Pet. (I) (challenging only whether conduct constituted "the predicate act of extortion under color of official right").[5] Nor is that issue worthy of this Court's review. Consequently, even if this Court were to hold in petitioners' favor on the question they present, respondent's RICO claim would still proceed.

3. Finally, as the Solicitor General frequently reminds the Court, "[t]he interlocutory nature of the ruling provides a sufficient basis to deny review." Brief for the Equal Employment Opportunity Comm'n in Opposition at 6, *Sidley Austin LLP v. EEOC*, No. 05-1481 (July 2006).[6] This Court

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ment over the *entirety* of the roadway across respondent's land as a condition of receiving a temporary license to graze cattle on *some* parcels of federal land. *See* 43 C.F.R. §§ 4130.2(d), 4130.3-2(h). Indeed, any such overreaching regulations would be unconstitutional. *See Dollan v. City of Tigard*, 512 U.S. 374, 386-396 (1994).

[5] Although the Question Presented does not cite the Hobbs Act, the phrase "under color of official right" is taken directly from that Act's definition of "extortion," *see* 18 U.S.C. § 1951(b)(2) , and is not used in the Wyoming extortion statute, *see* Wyo. Stat. Ann. § 6-2-402(a).

[6] *See also, e.g.*, Brief for the Respondents in Opposition at 11, *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2004) (No. 04-702); Brief for

"generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916).

The Solicitor General offers no compelling reason for departing from his normal position in this case. The RICO question depends on the assumption that petitioners engaged in extortionate conduct that was within their regulatory authority. That assumption may well be disproved in further proceedings and, at the very least, the question is best resolved on the basis of a fully developed factual record rather than on the court of appeals's assumption.

The same is true of the other questions presented as well. As shall be described below, the scope of the court of appeals's holdings on respondent's *Bivens* claim depends on what conduct the lower courts ultimately determine to be "unrelated to any final agency action." Pet. App. 82a. *See infra* 17-19. Waiting for final judgment will also avoid jurisdictional barriers to this Court's review of that holding. *See id.* Finally, the need to decide *any* of these issues may be mooted before final judgment if, for example, petitioners' view of the facts of the case prevails at trial.

### C. The Tenth Circuit's Decision Is Correct.

This Court's review is also unnecessary because the decision below was correct.

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the United States in Opposition at 8, *Alameida v. Mayweathers*, 540 U.S. 815 (2003) (No. 02-1655); Brief for the Respondent in Opposition at 7-8, *Romano v. SEC*, 526 U.S. 1111 (1998) (No. 98-1271); Brief for the United States in Opposition at 5, *Fleet Factors Corp. v. United States*, 498 U.S. 1046 (1990) (No. 90-504).

1. The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Nothing in this definition precludes an extortion claim against a government official simply because the abuse of government authority was the means of the extortion. To the contrary, the wrongful use of otherwise lawful governmental authority is at the historical heart of the common law crime of extortion and remains actionable under the Hobbs Act today. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (discussing common law origins of extortion). Indeed, this Court and others have repeatedly affirmed Hobbs Act convictions where the defendant misused official authority to commit extortion. For example, in *Evans v. United States*, 504 U.S. 255 (1992), a county commissioner committed extortion by implicitly promising to vote for a rezoning application in exchange for cash. Voting in favor of the proposal was indisputably within the commissioner's lawful authority, in the same way that some of petitioners' extortionate conduct may have involved acts within their lawful authority in this case. However, like petitioners here, the commissioner in *Evans* exercised his lawful authority for an unlawful purpose and thereby ran afoul of the Hobbs Act. Indeed, that is the essence of extortion "under color of official right." *See, e.g., United States v. Gillock*, 445 U.S. 360 (1980) (state senator blocked extradition of a defendant and agreed to introduce legislation in order to obtain cash payments); *United States v. Foster*, 443 F.3d 978 (8th Cir. 2006) (city aldermen agreed to vote in favor a construction project in order to obtain cash payments), *cert. denied*, No. 06-5964, 2006 WL 2400928 (Oct. 2, 2006); *United States v. Swift*, 732 F.2d 878, 879 (11th Cir. 1984) (city official who "had authority" to approve payment requests violated the Hobbs Act when he facilitated approvals in order to obtain money from a construction company); *United States v.*

*Jannotti*, 673 F.2d 578 (3d Cir. 1982) (city councilmen sought approval for hotel projects in order to obtain money from undercover agents posing as foreign investors); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979) (state transportation officials leased equipment from a private company in order to obtain campaign contributions from that company).

A different question might be presented if petitioners could show either that federal law *required* them to take the actions that they did, or that federal law permitted them to engage in the challenged conduct for the purpose of extorting an easement. But the most petitioners can say in this case is that their *end* may have been lawful (*i.e.*, securing an easement), and that *some of the means* employed would have been within their lawful authority if used for a lawful purpose (*e.g.*, revoking grazing permits for genuine violations of the grazing rules). But petitioners cannot reasonably claim that anything in federal law either permitted or required them to file false criminal charges, trespass on respondent's land, and the like, in order to extort an easement from him. As the Tenth Circuit recognized, even if petitioners may have had a right to an easement, they did not have the right to obtain that easement through extortion. Pet. App. 18a-20a (noting uniform rejection of "claim of right" defense to extortion outside context of labor disputes). *See also, e.g.*, *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991); *United States v. Zappola*, 677 F.2d 264, 269-270 (2d Cir. 1982); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979); *United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977).

Nor is petitioners' extortionate conduct excused simply because they sought property for the government rather than themselves. Fifty years ago, this Court held that "extortion as defined in the [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). The courts thus regularly apply the Hobbs Act to

extortion undertaken for the benefit of a third party.[7] This is true even when the defendant is a government official seeking to benefit another through the abuse of otherwise lawful authority.[8]

Acknowledging that it "is not always necessary that the defendant himself benefit from the extortion," petitioners seek to distinguish this case by proposing an exception to the rule: it is not extortion if the third-party recipient is the government. Pet. 13-14. Nothing in the language of the statute supports this exception, nor do petitioners cite any case adopting their revision of the Act. To the contrary, courts have recognized that "gravamen of the offense is loss to the victim," *United States v. Frazier*, 560 F.2d. 884, 887 (1977), not the identity of the beneficiary. *See* 18 U.S.C. § 1951(b)(2) (defining extortion without reference to the purpose or beneficiary of the extortion).

Accordingly, this Court and others have applied the concept of extortion to attempts to obtain property for the benefit of the government in a number of similar contexts. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (where Coastal Commission required public easement as condition of approval for a rebuilding permit,

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[7] *See, e.g., United States v. Panaro*, 266 F.3d 939, 948 (9th Cir. 2001); *United States v. Clemente*, 640 F.2d 1069, 1097-1080 (2d Cir. 1981); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977).

[8] *See, e.g., United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (city aldermen extorted contributions for a charity run by aldermen); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (public officials extorted money for political allies); *United States v. Scacchetti*, 668 F.2d 643 (2d Cir. 1982) (city judge extorted automobile services for his friend); *United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979) (state transportation officials extorted money for their political party); *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975) (town commissioner extorted money for the local political committee).

holding that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'") (citation omitted); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (same); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995) (rejecting qualified immunity claim where defendant denied excavation permit to plaintiffs because they refused to give the city a portion of their land, reasoning that the defendant "could not have believed . . . that he had discretion to deny an excavation permit to [plaintiffs] as a means of extorting land from them").

Petitioners may believe that the failure to explicitly exclude extortion on behalf of the government is a defect in the RICO statute. But that "defect – if defect it is – is inherent in the statute as written, . . . [and] its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 499-500 (1985).

2. Whether petitioners' obligations under the Hobbs Act were clearly established when the conduct in this case took place is not a question of general importance worthy of this Court's review. Petitioners do not assert that there is any circuit conflict over that question and, in any event, the Tenth Circuit's decision was correct. On qualified immunity, the relevant question is whether "in the light of preexisting law the unlawfulness [is] apparent." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Here, each component of petitioners' unlawful extortion is well-established by prior precedent. This Court and numerous courts of appeal have affirmed Hobbs Act Convictions of officials who took otherwise lawful acts to extort property from citizens and have held that personal interest need not exist to find a Hobbs Act violation. *See supra* 13-15. That no other case has confronted a situation precisely like this one is a testament to the unusual and egregious nature of petitioners' conduct, not to any

uncertainty in the law. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

## II. The Tenth Circuit's *Bivens* Holding Does Not Warrant Review By This Court.

Petitioners next ask this Court to decide whether the APA precludes a *Bivens* cause of action in the factual context of this case. This Court lacks jurisdiction to decide that question. At the same time, even if this Court had jurisdiction to consider the question, there is no reason to exercise it in this case. Petitioners fail to identify any real division among the courts of appeals on the question they present and the decision below is, in fact, correct.

### A. This Court Lacks Jurisdiction To Consider The Second Question Presented.

Appeals from denial of qualified immunity claims fall within a narrow exception to the normal jurisdictional bar against appellate review of non-final orders. *See, e.g.*, *Johnson v. Jones*, 515 U.S. 304, 309-12 (1995). Whether a *Bivens* cause of action is available in this case falls outside that limited jurisdiction because it does not go to petitioners' entitlement to qualified immunity, and because petitioners raised precisely the same objection in a prior qualified immunity appeal.

1. A qualified immunity appeal is strictly limited to a single "question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Accordingly, although a district court may simultaneously resolve other questions when the defense is raised, the only question on appeal is whether the defendant's conduct violated clearly established law. *See, e.g.*, *Johnson*, 515 U.S. at 313. Petitioners' argument that the APA pre-empts the *Bivens* cause of action is plainly distinct from the question whether their conduct violated clearly established law. Indeed, the two legal inquiries share virtually nothing in

common, the qualified immunity question turning on the nature of the underlying constitutional right and the *Bivens* pre-emption question turning on Congress's intent to provide an exclusive statutory means for enforcing that right. *Compare Mitchell*, 472 U.S. at 528, *with Davis v. Passman*, 442 U.S. 228, 246-47 (1979).

Petitioners argue that the pre-emption issue is nonetheless reviewable because it is "inextricably intertwined" with the qualified immunity question. Pet. 20. But this Court has previously rejected the assertion that appellate courts have broad "pendent appellate jurisdiction" in qualified immunity appeals. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-51 (1995). Petitioners' citation to a footnote in *Hartman v. Moore*, 126 S. Ct. 1695, 1702 n.5 (2006), establishes nothing to the contrary. Pet. 21. In that case, this Court considered whether lack of probable cause for a prosecution was a necessary element of a First Amendment retaliatory prosecution claim. *Hartman*, 126 S. Ct. at 1701. The Court rejected the suggestion that the question went beyond the scope of a proper qualified immunity appeal, explaining that the "definition of an element of the tort [] directly implicated . . . the defense of qualified immunity." *Id.* at 1702 n.5. By contrast, a *Bivens* pre-emption claim goes to the existence of a cause of action and not to the definition of the underlying constitutional violation. The *only* thing the qualified immunity and *Bivens* pre-emption claims have in common is that they are "threshold argument[s]," Pet. 20, that would provide a complete defense if proven. But that could be said of any number of affirmative defenses (*e.g.*, statute of limitations, waiver, etc.), none of which is subject to interlocutory review.

2. Even if this Court might otherwise have jurisdiction to review a *Bivens* pre-emption question on an interlocutory appeal, that jurisdiction is not available in this case because petitioners previously raised the same claim, under precisely

the same facts, in a prior appeal to the Tenth Circuit. *See* Pet. App. 80a-84a.

Contrary to petitioners' assertion, *Behrens v. Pelletier*, 516 U.S. 299 (1996), does not allow a second interlocutory appeal when nothing of relevance has changed between the motion to dismiss and the motion for summary judgment. In *Behrens*, this Court held that "resolution of the immunity question may 'require more than one judiciously timed appeal,' because the legally relevant factors bearing upon the [immunity] question will be different on summary judgment than on an earlier motion to dismiss." *Id.* at 309. In this case, however, "the legally relevant factors" have not changed between the motions to dismiss and for summary judgment. The question upon which petitioners seek review is a pure question of law and, in any event, the district court concluded that the evidence substantiated the allegations in the complaint, leaving the court with the same factual predicate on summary judgment as it had assumed on the motion to dismiss. Pet. App. 37a-39a. In such circumstances, a second appeal serves no purpose, as there is no reason to think that the court of appeals will not find the issue governed by law of the case or simply adhere to its prior decision as binding circuit precedent. *See Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999) (applying law of the case to second qualified immunity appeal). Accordingly, where the law and facts have not changed between the motion to dismiss and motion for summary judgment, the district court's decision is not "'too important to be denied review,' as [the Court's] finality jurisprudence requires." *Behrens*, 516 U.S. at 308 (internal citation omitted).

### B. There Is No Division Among The Circuits Regarding The APA's Preclusion Of *Bivens* Claims.

Even if this Court had jurisdiction to consider petitioners' *Bivens* pre-emption argument, the issue is unworthy of this Court's review.

Petitioners' assertion of a circuit split on the question is meritless. The Tenth Circuit held that the APA does not preclude a *Bivens* suit against individual BLM officials for "intentional misconduct . . . unrelated to any final agency action." Pet. App. 82a. No other circuit has held to the contrary. To be sure, some courts have said that the APA may preclude a *Bivens* action in appropriate circumstances even though "the scope of the two remedies may not be entirely coextensive." Pet. 18. But those statements have no relevance in this case, as the APA *does not even apply* to the challenged conduct here because it is "unrelated to any final agency action." Pet. App. 82a. In each of the decisions cited by petitioners, the defendant's actions were indisputably "related" to final agency action and were, in fact, actually subject to review under the APA.[9] The only question in

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[9] In *Sinclair v. Hawke*, 314 F.3d 934, 942 (8th Cir. 2003), the regulatory actions of the Office of the Controller of the Currency "were subject to administrative and judicial review processes that [plaintiff] invoked." In *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1908, the USDA inspectors' reports of food safety violations were actually under administrative appeal when the *Bivens* claim was made. See *Nebraska Beef, Ltd. v. Greening*, 2004 WL 546900, at *3 (D. Neb. 2004), *rev'd* 398 F.3d 1080. In *Miller v. United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998), the plaintiff's dismissal from his position as County Executive Director of the Agriculture Stabilization and Conservation Service "constitute[d] a final order," which the plaintiff was entitled to challenge by "bring[ing] suit in federal court for relief." And under nearly identically facts in *Moore v. Glickman*, "the APA provide[d] [plaintiff] with judicial

those cases, therefore, was whether the plaintiff was entitled to the *additional* remedy of a *Bivens* claim for compensatory damages. In this case, however, the question is whether the existence of an inapplicable statute precludes respondent from seeking any relief at all for serious constitutional violations. On that question, the cases cited by petitioners have nothing to say.

In addition, the circuit authority is inapposite because it does not deal with the regulatory regime at issue in this case. None of the cases cited by petitioners hold that existence of APA review is in itself sufficient to preclude a *Bivens* action. *See, e.g., Moore*, 113 F.3d at 994 ("Moore is correct that judicial review of her claim under the APA does not automatically preclude her *Bivens* claim."). Instead, each decision held that the APA provided an exclusive remedy in the case before the court because of the comprehensive regulatory regime applicable in that case.[10] None of the cases examined whether the regulatory regime governing federal land management is sufficiently comprehensive as to indicate Congress's intent to displace a *Bivens* remedy, the essential question here.

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review of her termination." 113 F.3d 988, 993 (9th Cir. 1997). Finally, in *Sky Ad, Inc. v. McClure* 951 F.2d 1146, 1148 (9th Cir. 1991), plaintiff complained of an FAA rule, and thus could seek judicial review because of "Congress' authorization in the APA for courts of appeals to set aside unconstitutional rulemaking."

[10] *See, e.g., Sinclair*, 314 F.3d at 942 (describing complex system of federal regulation of banks and concluding that "this comprehensive statutory regime precludes the *Bivens* damages claims asserted"); *Nebraska Beef*, 398 F.3d at 1084 (relying on "stringent exhaustion requirement for grievances filed against USDA employees" in addition to availability of APA review); *Moore*, 113 F.3d at 992-93 (relying on comprehensive federal statute governing federal employment rights); *Miller*, 143 F.3d at 1416 (same).

### C. The APA Does Not Preempt Respondent's *Bivens* Claim In This Case.

The Tenth Circuit's rejection of petitioners' *Bivens* preemption claim was, in any event, correct.

A *Bivens* remedy is foreclosed only when there are "special factors counseling hesitation in the absence of affirmative action by Congress," an "explicit statutory prohibition against the relief sought," or an "exclusive statutory alternative remedy." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (internal citation omitted). Petitioners rely on this last exception, arguing that "the remedial mechanism established by the APA . . . precluded respondent's *Bivens* claim." Pet. 18.

The court of appeals has already ruled that the APA precludes respondent's *Bivens* claim to the extent it is based on "constitutional violations committed while reaching a final agency decision." Pet. App. 81a. It is unclear at this stage how much of the predicate for respondent's Fifth Amendment claim falls within that description because petitioners declined to ask the district court to apply the Tenth Circuit's ruling at summary judgment. *See id.* at 26a. Petitioners nonetheless ask this Court to hold that they cannot be sued under *Bivens* even for violations "unrelated to final agency decisions appealable pursuant to the APA." *Id.* at 83a. Under petitioners' apparent view, individuals have no remedy at all for even the most egregious violations of their most basic constitutional rights whenever the defendants are employed by a federal agency subject to the APA. That unprecedented claim finds no support in the decisions of this or any other court.

Nothing in the APA indicates any congressional intent to immunize unconstitutional conduct undertaken by government officials "unrelated to any final agency action." Pet. App. 82a. Petitioners' assertion that "a *Bivens* action would be inconsistent with Congress's decision to shield non-final agency action from review under the APA," Pet. 19

(emphasis omitted), misses the mark. Petitioners' misconduct falls outside the APA because it is unrelated to agency action, not because it is non-final. And this Court has never held that a *Bivens* action is precluded simply because the officials violating the plaintiff's constitutional rights work for an administrative agency subject to the APA. The decisions in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), did not so hold but turned instead on a careful examination of the detailed statutory scheme Congress has established *beyond* the APA for judicial review of claims by federal employees, *Bush*, 462 U.S. at 380-89, and social security claimants, *Schweiker*, 487 U.S. at 424-25. Petitioners point to no comparable system of review in this case. That Congress enacted a statute to provide a remedy to *other* plaintiffs for *different* kinds of violations does not "suggest[] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker*, 487 U.S. at 423.

## III. There Is No Basis For Review Of The Tenth Circuit's Fifth Amendment Ruling.

Finally, petitioners ask this Court to review the Tenth Circuit's fact-bound determination that their conduct violated respondent's Fifth Amendment right to exclude the Government from his property absent a proper taking with just compensation. That question, which petitioners acknowledge is not the subject of any circuit split, does not warrant review by this Court either.

### A. Petitioners Do Not Assert Any Circuit Conflict Or Any Other Substantial Ground For Certiorari.

While petitioners complain at length that the decision below is wrong, they make only a half-hearted attempt to explain why that asserted error is worthy of this Court's review. Indeed, they acknowledge that there is no circuit split on the question, asserting instead that the decision below is

"the first" to address the question whether the Fifth Amendment prohibits government officials from attempting to coerce a waiver of Fifth Amendment rights. *See* Pet. 12, 25-26.

That petitioners can find no other decision addressing this question illustrates its unworthiness for review by this Court; petitioners can hardly claim that the decision below is of recurring importance when no other court has addressed the specific questions raised in this unusual case in the 215 years since the Fifth Amendment's ratification. The interlocutory posture of the appeal and the undeveloped factual record, *see supra* 12, make the case a particularly poor vehicle for resolving the scope of the Fifth Amendment's protections in any event.

**B. The Decision Below Is Correct.**

Faced with an unusual, perhaps unprecedented, campaign by government officials to evade the strictures of both their regulatory authority and the Fifth Amendment, the Tenth Circuit properly applied established legal principles in rejecting petitioners' claim of qualified immunity.

1. This Court has previously recognized, and petitioners concede, that the Fifth Amendment protects the foundational right of every citizen to exclude the Government from his property unless the Government actually takes the property through eminent domain and tenders the owner just compensation. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The essence of respondent's claim is that petitioners attempted to evade this constitutional limitation on their authority in order to acquire his property by threat and extortion rather than through *bona fide* negotiations or eminent domain.

Petitioners' principal defense to that claim is that their attempt to evade the Fifth Amendment has, thus far, failed. Pet. 22-23. The Fifth Amendment, they say, will not be violated until they have succeeded in extorting property from

respondent without invoking eminent domain or paying just compensation. They therefore claim that respondent's "sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act, 18 U.S.C. 1491 (2006), once a taking has occurred." *Id.* at 23. This argument is baseless. If petitioners actually succeeded in coercing respondent into granting them an easement without compensation, the Government doubtless would argue that he has no claim under the Tucker Act because there was no taking. Thus, under petitioners' apparent view, the Constitution neither protects citizens from officials' attempts to extort their property, nor provides a remedy if the extortion is successful.

Unsurprisingly, there is no basis for this remarkable claim of constitutional inadequacy. The Fifth Amendment provides one, and only one, method for the coercive extraction of private property by the Government: eminent domain. Although that method entails the payment of just compensation – the neglect of which is subject to judicial remedy – it also necessarily precludes government officials from attempting to extract property through other coercive means. Thus, in *Kaiser Aetna* this Court held that the Fifth Amendment protected a private citizen from the Government's attempt to secure an easement outside the eminent domain process, even though the Government had not yet obtained the property right. In that case, the Army Corps of Engineers asserted that its right to regulate the navigable waters of the United States under the Rivers and Harbors Act included the power to require the defendants to grant a public easement on a private marina. 444 U.S. at 168-69. This Court rejected the Government's argument:

> [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation . . . . Thus, if the Government wishes to make [private

> property] . . . into a public aquatic park . . . it may not, without invoking its eminent domain power and paying just compensation, require them to allow free [public] access . . . .

*Id.* at 179-180. Importantly, the Court did not hold, as petitioners now urge, that the Fifth Amendment had no application unless and until the Government succeeded in obtaining the easement. Instead, the Court allowed the landowner to assert the Fifth Amendment as a shield against the Government's attempt to coercively acquire an easement outside of the eminent domain process.

The Tenth Circuit's Fifth Amendment holding also draws support from "the well-settled doctrine of 'unconstitutional conditions.'" *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Under that doctrine, "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837-38 (1987), this Court held that the United States Coastal Commission could not condition a building permit on the developer granting a public access easement across his land because there was no "essential nexus" between the permit requested and the easement demanded. In the absence of such a nexus, the Government's demand for a citizen's property is "simply trying to obtain an easement through gimmickry, which convert[s] a valid regulation of land use into 'an out-and-out plan of extortion.'" *Dolan*, 512 U.S. at 387 (internal citations omitted).

The same is true here. The Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights. The denial of those benefits had no relationship to the BLM's legitimate

regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an "out-and-out plan of extortion." *Id.*

Finally, as the court of appeals noted, just as the Government may not condition governmental benefits on the waiver of constitutional rights, it may not go even further and affirmatively punish citizens for the exercise of their fundamental constitutional freedoms. It is true that unconstitutional retaliation has been recognized most frequently in the context of the right to petition for redress of grievances and the contexts of free speech and association.[11] But contrary to petitioners' assertion, neither the doctrine nor its rationale is limited to protecting First Amendment freedoms. This Court has recognized that, as a general matter, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977). Thus, for example, the Constitution prohibits retaliating against a criminal defendant who successfully exercises his Due Process right to appeal his conviction by imposing a greater sentence upon reconviction, *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), or by re-indicting the defendant on more serious charges, *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974). In reaching these decisions, this Court has not relied on any principle specific to the protections of the First Amendment or the Due Process Clause. Rather, the Court has acted on the general principle that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S.

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[11] *See, e.g., Burton v. Jones*, 321 F.3d 569 (6th Cir. 2003) (alleging retaliation for filing a lawsuit); *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990) (alleging retaliation for hiring an attorney); *Merritt v. Hawk*, 153 F. Supp 2d 1216 (D. Colo. 2001) (alleging retaliation for petitioning to improve conditions).

at 363 (citation omitted). *See also United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted).

The court of appeals was thus correct in acknowledging in this case that citizens are protected from retaliation for the exercise of rights found under the Fifth Amendment as well:

> If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government, and government officials will be more inclined to obtain private property by means outside the Takings Clause. The constitutional right to just compensation, in turn, would become meaningless. Because retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful.

Pet. App. 14a-15a.

2. Finally, although petitioners complain that the Tenth Circuit erred in finding respondent's constitutional rights clearly established in the context of this case, they fail to demonstrate why that fact-bound question is worthy of this Court's review. As demonstrated above, any reasonable official in petitioners' position would have understood that he could not evade the limitations of the Takings Clause, and punish a citizen's insistence on his Fifth Amendment rights, through a campaign of threats, harassment and retaliation. Indeed, petitioners do not seriously assert otherwise, but instead simply repeat their baseless claim that their conduct was nothing more than a proper "exercise of their lawful regulatory authority." Pet. 27.

## IV. The Tenth Circuit's Decision Will Have No Impact On The Government's Legitimate Land Management Interests.

Unable to identify a significant division of authority on any of the legal questions decided by the court of appeals, or any other sound basis supporting review of this interlocutory decision, petitioners resort to predictions of dire consequences for the national government if review is denied. Pet. 28-29. Those speculations are without foundation and, in any case, do not provide a reason for review of the decision in this case at this time.

There is no question that the federal government owns much land in the West and interacts with private land owners on a regular basis. *Id.* But petitioners provide no reason to think that the Tenth Circuit's decision will interfere with that process in any way. The court of appeals went out of its way to state that it was *not* holding that routine implementation of the reciprocal right-of-way regulation would be illegal. Pet. App. 17a-18a. Moreover, petitioners have identified no other statute or regulation authorizing extortion as a means for obtaining easements outside the process of eminent domain. Nor do petitioners claim that such conduct is part of the BLM's ordinary practices or that prohibiting it would impair the agency's ability to fulfill its mission.

Indeed, petitioners themselves assure this Court that conflicts such as this one are very rare, noting that the "BLM has without incident negotiated thousands of such reciprocal rights-of-way across private lands intermingled with public lands." Pet. 28. This undoubtedly explains why petitioners are unable to cite even a single case arising under similar circumstances, much less demonstrate an entrenched division of authority among the courts of appeals on any of the questions raised in this case.

In any event, if petitioners' dire predictions do somehow come to pass, surely future cases with similar facts will arise and give this Court ample opportunity to address the

questions presented in this petition at that time. Waiting for a future case would also avoid the numerous jurisdictional and other prudential impediments to reaching the questions presented in this case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-219

# In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The court of appeals' ruling exposes government officials to damages actions under RICO and *Bivens* for engaging in regulatory activity that the court explicitly assumed to be within an employee's lawful duties and without the purpose of personal gain. Pet. App. 18a. Respondent has provided no persuasive reason for this Court to leave that far-reaching ruling unreviewed. Nor has he rebutted petitioners' showing that the court of appeals' decision conflicts in multiple respects with the precedents of this Court and other circuits; improperly transforms presumptively lawful land management activities into unconstitutional state action; and disregards bedrock qualified immunity principles. Rather, respondent's multi-layered attempt to avoid certiorari simply underscores the sweeping nature of the court of appeals' holdings and the cause for concern that the decision will chill responsible regulatory conduct in a broad range of contexts, including management of the tens of millions of acres of intermingled public and private lands within the Tenth Circuit. Accordingly, this Court's review is warranted.

### A. The Court of Appeals' RICO Holding Warrants This Court's Review

1. As an initial matter, petitioner argues that the court of appeals' decision, and in particular its RICO holding, does not warrant review at this time because the case is in an interlocutory posture. While petitioner cites to no fewer than five briefs in opposition to certiorari filed by the Solicitor General pointing out that the interlocutory posture of a case may be a ground for denying review, *none* of those cases involved claims of qualified immunity. Appeals from the denial of qualified immunity are by their nature interlocutory, and that has never stopped this Court from granting review in such cases. Indeed, because "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation,'" this Court has "repeatedly * * * stressed the importance of resolving immunity

questions at the earliest possible stage in litigation." *Saucier* v. *Katz*, 533 U.S. 194, 200-201 (2001) (citations omitted). Because the immunity would be largely meaningless without the ability to obtain interlocutory review, see *Hartman* v. *Moore*, 126 S. Ct. 1695, 1702 n.5 (2006), the interlocutory posture of this case provides no reason for denying certiorari.

2. Respondent's effort to avoid review of the RICO issue is premised on his assertion that "[t]he extortion in this case arises principally" not from the attempt to obtain a reciprocal easement on respondent's land, but "from the *other* actions petitioners took—actions not authorized by the regulations or any other source of law, such as filing false criminal charges, trespassing on respondent's land, canceling his special use and grazing permits on false pretenses, etc." Br. in Opp. 10. That premise, however, is unfounded for several different reasons.

To begin with, the court of appeals explicitly decided the RICO issue on the premise that petitioners at all times acted *within* the scope of their regulatory authority and held that they nonetheless could be guilty of extortion if they undertook those actions with "extortionate intent," even though it is undisputed that they did not act in furtherance of any personal interest or the interest of a third party other than the government. Pet. App. 18a ("[W]e conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO.").

Accordingly, respondent's statement (Br. in Opp. 8) that "the Tenth Circuit held that petitioners would be subject to liability only if they were *not* acting to 'carry out their regulatory duties' in filing false criminal charges against respondent, trespassing on his property, and engaging in the various other extortionate acts that form the basis of liability in this case" is manifestly incorrect. In fact, the court of appeals expressly held that those actions could constitute extortion and give rise to RICO liability—if the requisite "extortionate intent" were

present—even though it conceded that "the regulatory authority may exist" for each of those actions. Pet. App. 17a-18a. And the upshot is that the court permitted this action to proceed to discovery and a possible trial on the RICO claim.

Respondent's related assertion (Br. in Opp. 6) that the decision below will "have no broader or recurring significance" is mistaken for the same reason. Under the court of appeals' RICO ruling, government officials in a broad range of contexts who have direct regulatory contact with private citizens could be exposed to liability, including treble damages, based solely on the allegation that their otherwise lawful regulatory actions were undertaken with an "improper" motive to obtain property for the public interest. That threat is particularly strong where, as here, government officials are dealing with citizens who routinely resort to "intransigence" as a tactic for dealing with the government. *Frank Robbins*, 146 I.B.L.A. 213, 219 (1998); see Pet. 5-6.

Furthermore, respondent's effort to recharacterize the fundamental RICO question presented by this case ignores the fact that the regulatory actions at issue were undertaken only to benefit the government and not to benefit either petitioners or any third person. The RICO cases cited by respondent (Br. in Opp. 13-14) involve the classic situation of the misuse of public office for private gain (*i.e.*, graft). Respondent cites no case holding government officials guilty of extortion when they seek neither a personal gain nor a benefit for a third party other than the government. For the reasons explained in the petition (Pet. 13-16), no such case exists.[1]

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[1] Contrary to respondent's assertion (Br. in Opp. 15), petitioners do not contend that there is a special, nontextual exception for government employees under the Hobbs Act. Rather, petitioners argue that a government employee can only wrongfully "obtain" the property of another with the required *quid pro quo* if he seeks the property for his own benefit or the benefit of a third party other than the government. The government does not commit the offense of extortion merely because it obtains property in excess of its regulatory authority to do so. The same is true of government

The regulatory actions respondent alleges do not support his claim of extortion for additional reasons. He alleges that government employees trespassed on his land, but trespass is not in its nature extortionate. His complaint that petitioners caused false criminal charges to be filed against him was resolved against him by the district court. See Pet. App. 62a-67a. And it is too late for respondent to allege in this RICO action that the government improperly cancelled his easement and special use and grazing permits. If, as respondents allege, those actions were taken without authority or for improper purposes, he could have enjoined them through traditional administrative and judicial avenues when the actions were taken. But having passed on his opportunity to challenge those actions through appropriate and timely administrative and judicial means, he cannot now use them as the basis for his RICO and *Bivens* action by alleging that they were undertaken with an improper motive.

3. Respondent's attempt to distinguish the Eighth Circuit's decision in *Sinclair* v. *Hawke*, 314 F. 3d 934 (2003), is unavailing. Respondent asserts (Br. in Opp. 8) that the *Sinclair* court rejected the RICO claim in that case because the plaintiffs claimed only discrimination and did not even attempt to establish extortion or any of the other predicate acts enumerated in RICO. See 18 U.S.C. 1961(1). But that is not the ground on which the Eighth Circuit based its holding. Rather, the court held that the plaintiff could not state a RICO cause of action because the government employees in that case had "take[n] regulatory action consistent with their statutory powers," and to the extent those employees had overstepped proper regulatory bounds, they could not be held personally liable under RICO for their actions. *Sinclair*, 314 F.3d at 943. In short, the court held, "bank

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employees acting only in the public interest. Aggressive regulatory action may be challenged or enjoined through established administrative and judicial procedures, but regulators who take such actions are not extortionists in any sense of that term as used by either the Hobbs Act or state criminal laws.

regulators do not become racketeers by acting like aggressive regulators." *Id.* at 944. Even respondent agrees that the Eighth Circuit's RICO holding in *Sinclair* was "correct" (Br. in Opp. 8), yet he defends the contrary conclusion reached by the Tenth Circuit below.

The court of appeals below recognized that *Sinclair* was otherwise relevant and distinguished it only on the narrow ground that it involved no disputed issue of fact as to the regulators' improper motive. Pet. App. 21a ("In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from [respondent]."). But that factual distinction is also misguided, both because *Sinclair* expressly did involve allegations that otherwise permissible regulatory acts were undertaken with unlawful motives, see 314 F. 3d at 939 ("The issue, broadly stated, is whether Congress has authorized wide-ranging judicial review of *regulators' motives* in personal damage actions that might have a chilling effect on their willingness to aggressively attack unsafe and unsound banking practices.") (emphasis added), and because the alleged improper motive in this case—seeking to obtain a reciprocal easement on respondent's land for the public interest—was itself a legitimate regulatory objective. It makes no sense to speak of an extortionate intent when, as here, the only property public officials are alleged to have (improperly) sought was for the benefit of the public. See Pet. 14-16.

### B. The Court Of Appeals' *Bivens* Holdings Warrant This Court's Review

As explained in the petition (Pet. 16-26), the court of appeals' decision permitting respondent's extraordinary *Bivens* claim to proceed independently merits this Court's review. Respondent's attempt to avoid such review is unpersuasive.

1. Respondent's brief jurisdictional objection is without merit. This Court in *Hartman* v. *Moore*, 126 S. Ct. at 1702 n.5, made

clear that the question whether a plaintiff has stated a cause of action under *Bivens* is "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on [the] interlocutory appeal" concerning qualified immunity. While the issue in *Hartman* concerned whether the party had properly satisfied the *elements* of the constitutional torts alleged in that case, there is no reason to reach a different conclusion where, as here, the question is the even more fundamental one of whether *Bivens* provides a cause of action *vel non*. In both cases, the question is purely legal, relates to what the plaintiff "must plead and prove in order to win," *Ibid.*, and is inextricably intertwined with the question of immunity. Indeed, properly understood, the question in both cases is the same: whether the plaintiff can state a cause of action under *Bivens*. Here, respondent plainly cannot, because—as other courts have recognized in analogous circumstances—the APA establishes a comprehensive remedial mechanism governing challenges to administrative actions such as those at issue in this case. See Pet. 17-21.[2]

2. The court of appeals rejected the APA preclusion argument to the extent that any of respondent's allegations of retaliation did not "involve individual action leading to final agency decisions reviewable pursuant to the APA." Pet. App. 82a. That holding is inconsistent with the court of appeals decisions cited in the petition (Pet. 18-19), which make clear that the APA constitutes a comprehensive statutory review mechanism that precludes a *Bivens* action, even where the APA does not provide a remedy for certain allegations. While those

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[2] Respondent's argument (Br. in Opp. 18-19) that the court of appeals lacked jurisdiction over the APA preclusion claim because it had been addressed in the prior interlocutory appeal in this case is equally misguided. Indeed, in *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996), this Court specifically indicated that resolution of qualified immunity issues may "require more than one judiciously timed appeal." The court of appeals properly concluded that more than one such appeal was permitted here. See Pet. App. 6a-9a.

cases do not involve the specific context of federal land management, they do reject the reasoning of the court of appeals below that the APA precludes a *Bivens* action only to the extent it provides a remedy for each allegation of regulatory misconduct. See, *e.g.*, *Sinclair*, 314 F.3d at 940; *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006); *Miller* v. *United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998).

Moreover, contrary to respondent's assertion, his allegations of retaliation are not "unrelated to any final agency action." Respondent himself, in challenging the Bureau of Land Management's (BLM's) determination that respondent had trespassed on public lands, argued that the litany of BLM actions against him were part of an effort to "blackmail" him into providing a reciprocal easement to the government. See *Frank Robbins*, 146 I.B.L.A. at 218. The Interior Board of Land Appeals (IBLA) rejected that argument, finding that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of that decision, just as he did not seek judicial review of his challenges to the BLM's decisions to cancel his right-of-way on public lands and his grazing and special use permits and to fine him for trespass—the very regulatory acts he now claims resulted in the "complete destruction of [his] business." Br. in Opp. 2; see Pet. 5-7. Respondent cannot simultaneously contend that all of petitioners' actions were in furtherance of a plan to extort a reciprocal easement and that certain of those acts (those not leading to final agency action) are unrelated to the actions (the cancelling of his right-of-way and permits) that he claims primarily caused his injuries.

Respondent also fundamentally misstates petitioners' position regarding APA preclusion. Petitioners do not contend that "individuals have no remedy at all for even the most egregious violations of their most basic constitutional rights whenever the defendants are employed by a federal agency subject to the

APA." Br. in Opp. 22. Rather, petitioners' position is that where, as here, Congress has provided a comprehensive regime for administrative and judicial review, including review of constitutional claims under 5 U.S.C. 706(2)(B), that regime, and not *Bivens*, is the appropriate mechanism for raising constitutional and other claims.

3. Respondent's attempt to defend the court of appeals' unprecedented Fifth Amendment ruling is unavailing. See Br. in Opp. 24-26. Relying, *inter alia*, on this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994), respondent asserts that "[t]he Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights," because "[t]he denial of those benefits had no relationship to the BLM's legitimate regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an 'out-and-out plan of extortion.'" Br. in Opp. 26-27 (citation omitted). But there are several problems with respondent's reliance on those decisions.

First, as found in respondent's administrative challenges to each of the complained-of actions, petitioners had good and sufficient regulatory reasons for each of the actions taken and did not base their decisions on a desire to obtain an easement on respondent's land. Respondent—like the land owners in *Nollan* and its progeny—could have sought judicial review of those adverse administrative adjudications and, if he could establish the improper motivation he now alleges, could have prevented those actions from occurring. He did not do so. He therefore should not now be able to avoid dismissal on the ground of qualified immunity by merely alleging in this extraordinary *Bivens* action the same improper motives that he failed to establish in the customary administrative and judicial proceedings available to him at the time.

Second, in the *Nollan* line of cases upon which respondent relies, there was an actual interference with property owned by *the private citizen*. In *Nollan* itself, for example, the property owners were denied a building permit on their land unless they agreed to a public easement. Here, in contrast, respondent alleges—at most—that petitioners placed an improper condition on an asserted right to use *public* lands. At bottom, respondent alleges that he is being denied the use of *public* lands—namely, maintenance of the federal portion of Owl Creek Road and grazing privileges on federal lands—because he will not consent to a reciprocal right-of-way over his portion of the road. While a property owner is free to argue that conditions on the use of public lands violate his due process or equal protection rights, there is no support for the rule adopted by the court of appeals in this case that alleged conditions on the use of public land may constitute a *taking* under the Fifth Amendment.

Respondent cannot avoid the disconnect between the conditions he is challenging on his use of public land and the Takings Clause simply by pointing to the "right to exclude." To be sure, the Fifth Amendment Takings Clause encompasses a right to exclude others, including the government, from one's property. See Pet. 21. But that right does not support a *Bivens* action where, as here, the landowner pointedly has not alleged, much less shown, any taking as the basis for his Fifth Amendment claim. And it certainly provides no basis for a *Bivens* action where the landowner ultimately is asserting government interference with his enjoyment of public lands.

Third, as explained in the petition (Pet. 25-26), no court has recognized an anti-retaliation right outside the First Amendment context, and there is no reason to extend such a right to the fundamentally different context of the Fifth Amendment Takings Clause. Among other things, the relatively common situation of interlocking federal and private lands necessarily requires back and forth between the government and private landowners. In addition, even beyond that situation, the takings context

necessarily envisions a degree of permissible government interference with property rights, albeit with just compensation, wholly alien to the First Amendment.

### C. The Court of Appeals' Qualified Immunity Holding Warrants This Court's Review

The court of appeals holding that the Fifth Amendment and statutory rights it relied upon were *clearly established* is indefensible. No previous decision of any court suggests that petitioners' conduct in attempting to obtain a reciprocal right-of-way from respondent through the exercise of their lawful regulatory authority (as expressly assumed by the court of appeals) would violate any statutory or constitutional right. Indeed, no court had even expanded the right against retaliation to the Fifth Amendment context. Respondent does not suggest that any such case law exists. Instead, he asserts that the question whether any right was clearly established at the time of the conduct in this case is a "fact-bound" question that does not warrant this Court's review. But the question whether conduct violated a clearly established right is the *legal* question at the core of the qualified immunity analysis. *Saucier*, 533 U.S. at 201-202; *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). Given the importance of the questions presented to federal land management and a variety of other regulatory contexts—and the potential of the decision below to cause substantial disruption in those areas—this Court's review is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

NOVEMBER 2006

(15)

No. 06-219

# In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## JOINT APPENDIX


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PETITION FOR A WRIT OF CERTIORARI FILED: AUG. 11, 2006
CERTIORARI GRANTED: DEC. 1, 2006

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 98-CV-201-CAB

HARVEY ROBBINS, PLAINTIFF-APPELLEE

*v.*

CHARLES WILKIE, ET AL., DEFENDANT-APPELLANT

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 2/18/04 | [1686808] Civil case docketed. Preliminary record filed. |
| 2/24/04 | [1688302] Briefing of the merits is tolled pending further order of the court. Order filed by PF (crr) considering this case for summary disposition under 10 Cir. R. 27. Within 30 days appellant shall serve and file a memorandum brief. Plaintiff shall file memorandum brief in response within 21 days of the date of service of the appellant's memo brief. Apet memorandum briefs due 3/25/04 for Charles Wilkie, et al. Eres memorandum brief due 4/15/04 for Harvey Frank Robbins. |

| DATE | PROCEEDINGS |
|---|---|
| 2/25/04 | [1689041] Appellee's motion to dismiss appeal for lack of appellate jurisdiction filed by Harvey Frank Robbins. |
| 2/26/04 | [1689155] Appellee's response filed by Harvey Frank Robbins to court's order dated February 24, 2004 regarding filing of memorandum brief regarding 10th Circuit Court's appeal jurisdiction. |
| 3/29/04 | [1697496] Appellants' memorandum brief and response to motion to dismiss appeal filed by Charles Wilkie, et al. |
| 4/2/04 | [1698365] Appellee's Response filed by Harvey Frank Robbins to Appellants' Memorandum Brief and Response to the Court's Motion to Dismiss Appeal. |
| 10/7/04 | [1746617] Order filed by PF (err) the court reserves judgment on the motion to dismiss and the jurisdictional issue raised in this court's show cause order. Briefing on the merits shall proceed. The appellants shall serve and file their opening brief within 40 days of the date of this order. Subsequent briefing shall proceed in accordance with the schedule set forth in the Tenth Circuit Rules. Appellant's brief and appendix due 11/16/04 for Charles Wilkie, et al. |

| DATE | PROCEEDINGS |
|---|---|
| 11/17/04 | [1757972] Appellants' brief filed by Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, Gene Leone, and David L. Wallace. Appendix filed. |
| 12/21/04 | [1766576] Appellee's deficient brief filed by Harvey Frank Robbins in 04-8016 (no statement inside brief regarding oral argument). Appellee's corrected brief due 1/3/05 for Harvey Frank Robbins. |
| 12/22/04 | [1766949] Order filed by PF granting Appellee's motion to file a supplemental appendix. |
| 12/22/04 | [1767413] Amicus Curiae brief filed by Pacific Legal in 04-8016. |
| 12/27/04 | [1767893] Appellee's corrected brief filed by Harvey Frank Robbins in 04-8016. |
| 1/13/05 | [1772936] Appellee's supplemental authority filed by Harvey Frank Robbins. |
| 1/25/05 | [1775513] Appellants' reply brief filed by Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, Gene Leone, and David L. Wallace in 04-8016. |
| 9/14/05 | [1845317] Case argued by Edward Himmerfarb, for appellant and by Marc R. Stimpert, for appellee; Submitted to Judges Kelly, Henry, Murphy. |

| DATE | PROCEEDINGS |
|---|---|
| 1/10/06 | [1876964] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Kelly; Henry; Murphy, authoring judge. |
| 2/24/06 | [1891952] Petition for rehearing en banc [04-8016] filed by Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller, Gene Leone, and David L. Wallace in 04-8016. |
| 3/21/06 | [1899624] Appellants' motion to stay the mandate until 6/12/06 filed by appellants Charles Wilkie, Darrell Barnes, Teryl Shryack, Michael Miller and Gene Leone, David L. Wallace in 04-8016 to stay execution of the mandate until 6/12/06. |
| 3/21/06 | [1899647] Order filed by Judges Kelly, Henry and Murphy denying Appellant's motion to stay execution of the mandate until 6/12/06. |
| 3/22/06 | [1899961] Mandate issued. |
| 3/29/06 | [1902226] District Court order extending stay pending appeal on qualified immunity filed. |

UNITED STATES DISTRICT
COURT FOR THE DISTRCT OF WYOMING
(CHEYENNE)

No. 2:98-CV-00201-CAB

ROBBINS, PLAINTIFF

*v.*

BLM, ET AL., DEFENDANT

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 08/12/1998 | 1 | COMPLAINT (summons(es) issued) filing fee paid - $150.00 receipt # 287304 (dn) (Entered: 08/17/1998) |
| 08/12/1998 | 2 | DEMAND for jury trial by plaintiff Harvey Frank Robbins Jr (dn) (Entered: 08/17/1998) |
| | * * * * * | |
| 10/13/1998 | 6 | MOTION by defendants to dismiss complaint (dktclerk) (Entered: 10/15/1998) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/13/1998 | 7 | MEMORANDUM by defendants in support of motion to dismiss complaint [6-1] dkt lerk) (Entered: 10/15/1998) |
| 10/13/1998 | 8 | MOTION by defendant USA to substitute USA for individual federal defendants Wilkie, Vessels, Barnes, Shryack, Merrill, Stimson, Miller and Leone with respect to claims of malicious prosecution, abuse of process and trespass (dktclerk) (Entered: 10/15/1998) |
| | * * * * * | |
| 11/06/1998 | 24 | MOTION by plaintiff to amend complaint (dn) (Entered: 11/09/1998) |
| 11/06/1998 | 25 | FIRST AMENDED COMPLAINT [1-1] by plaintiff Harvey Frank Robbins Jr (dn) (Entered: 11/09/1998) |
| | * * * * * | |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 11//09/1998 | 29 | OPPOSITION by plaintiff to motion to dismiss complaint [6-1] (dn) (Entered: 11/10/1998) |
| 11/10/1998 | 30 | ORDER by Magistrate Judge William C. Beaman granting motion to amend complaint [24-1] (cc: all counsel 11/10/98) (dn) (Entered: 11/10/1998) |
| | * * * * * | |
| 11/10/1998 | 32 | REPLY by defendants BLM, DOI, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, USA to plaintiff's opposition to motion to dismiss [29-1] (dn) (Entered: 11/12/1998) |
| 11/10/1998 | 33 | RESPONSE by defendants BLM, DOI, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, BLM-Employee, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | BLM-Employee, USA to motion to amend complaint [24-1] (dn) (Entered: 11/12/1998) |
| | | * * * * * |
| 12/10/1998 | 38 | MOTION by defendants to dismiss first amended complaint (dktclerk) (Entered: 12/11/1998) |
| 12/10/1998 | 39 | MEMORANDUM (BRIEF) by defendants in support of motion to dismiss first amended complaint [38-1] (dktclerk) (Entered: 12/11/1998) |
| 12/14/1998 | 40 | MOTION by defendant Gene Leone, BLM-Employee to dismiss as party (dn) (Entered: 12/14/1998) |
| 12/15/1998 | 41 | ORDER by Honorable Clarence A. Brimmer granting motion to dismiss as party [40-1] BLM-Employee, Gene Leone (cc: all counsel & EOD 12/15/98) (dn) (Entered: 12/15/1998) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 01/12/1999 | 55 | OPPOSITION by plaintiff to defendants' second motion to dismiss [38-1] (dktclerk) (Entered: 01/12/1999) |
| | | * * * * * |
| 01/28/1999 | 58 | REPLY by defendants to plaintiff's opposition to defendants' second motion to dismiss [55-1] (dn) (Entered: 01/28/1999) |
| | | * * * * * |
| 08/13/1999 | 71 | ORDER by Honorable Clarence A. Brimmer denying motion to dismiss complaint [6-1] (cc: all counsel 8/13/99) (dn) (Entered: 08/13/1999) |
| | | * * * * * |
| 10/18/1999 | 75 | COURTROOM MINUTE SHEET: motion for expedited consideration of motion to amend complaint and to vacate 10/18/99 hearing [73-1] - granted as to motion to amend |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | and denied as to motion to vacate; motion to amend complaint [72-1] granted; motion to vacate 10/18/99 hearing [72-2] denied; motion to dismiss first amended complaint [38-1] moot ; motion for order to challenge attorney general scope certifications [26-1] moot (Ct Rptr: Robertson) (dn) (Entered: 10/18/1999) |
| 10/18/1999 | 76 | AMENDED COMPLAINT [25-1], [1-1] by Harvey Frank Robbins Jr: terminating defendant BLM, defendant DOI, defendant BLM Employee, defendant BLM Employee, defendant BLM Employee, defendant BLM Employee, defendant BLM BLM Employee, defendant BLM Employee, defendant BLM Employee, defendant BLM Employee, defendant USA; adding Charles Wilkie, Joe Vessels, Darrell Barnes, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Teryl Shryack, Patrick Merrill, David Stimson, Michael Miller, Gene Leone (dn) Modified on 7/9/2003 (jlg,) (PARAGRAPHS 112 THROUGH 135 HAVE BEEN STRICKEN PER PLEADING 149). (Entered: 10/18/1999) |
| 10/18/1999 | 77 | ORDER by Honorable Clarence A. Brimmer denying motion to vacate 10/18/99 hearing [72-2], denying motion for expedited consideration of motion to amend complaint and to vacate 10/18/99 hearing [73-1], granting motion to amend complaint [72-1] (cc: all counsel mld 10/19/99) (dktclerk) (Entered: 10/19/1999) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | * * * * * |
| 11/08/1999 | 80 | MOTION by defendants to dismiss second amended complaint (dktclerk) (Entered: 11/08/1999) |
| | | * * * * * |
| 12/09/1999 | 86 | OPPOSITION by plaintiff to motion to dismiss second amended complaint [80-1] (dktclerk) (Entered: 12/09/1999) |
| 12/20/1999 | 87 | REPLY by defendants to plaintiff's opposition to motion to dismiss second amended complaint of plaintiff [86-1] (dktclerk) (Entered: 12/20/1999) |
| | | * * * * * |
| 05/09/2001 | 98 | ORDER by Honorable Clarence A. Brimmer granting motion to dismiss with prejudice second amended complaint [80-1] terminating case (cc: all counsel EOD 5/9/01) (jlg) (Entered: 05/09/2001) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 5/25/2001 | 99 | NOTICE OF APPEAL by plaintiff Harvey Frank Robbins Jr from District Court decision [98-2] Receipt # 294717 (cc: all counsel) (js) (Entered: 05/25/2001) |
| | * * * * * | |
| 10/17/2002 | 108 | MANDATE from USCA reversing and remanding the decision of the USDC Appeal [99-1] appeal 01-8037 (js) (Entered: 10/17/2002) |
| | * * * * * | |
| 10/18/2002 | 110 | ORDER ON MANDATE by Honorable Clarence A. Brimmer; it is ordered that this matter be restored to the civil docket for further action Case reopened (cc: all counsel mld 10/18/02) (jlg) (Entered: 10/18/2002) |
| | * * * * * | |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 01/03/2003 | 122 | MOTION by defendants to dismiss second amended complaint (dn) (Entered: 01/03/2003) |
| 01/03/2003 | 123 | MEMORANDUM by defendants in support of motion to dismiss second amended complaint [122-1] (dn) (Entered: 01/03/2003) |
| | * * * * * | |
| 01/27/2003 | 127 | OPPOSITION by plaintiff to defendants' motion to dismiss second amended complaint [122-1] (dn) (Entered: 01/27/2003) |
| | * * * * * | |
| 02/13/2003 | 129 | COURTROOM MINUTES: taking under advisement on 2/13/03 the motion to dismiss second amended complaint [122-1] dispositive motion hearing held (Ct Rptr: Dew-Harris) (dn) (Entered: 02/13/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 03/21/2003 | 130 | ORDER by Honorable Clarence A. Brimmer granting in part and denying in part defendants' motion to dismiss second amended complaint [122-1]; motion is denied as to plaintiff's first claim for relief, violation of RICO, and plaintiff's unconstitutional retaliation claim under Bivens; motion is granted as to plaintiff's Bivens claims alleging violation of the Fourth Amendment and violation of procedural and substantive components of the due process clauses of the Fifth and Fourteenth Amendments (cc: all counsel & EOD 3/21/03) (dn) Modified on 03/21/2003 (Entered: 03/21/2003) |
| 04/04/2003 | | TRANSCRIPT of motion proceedings (motion to dismiss second amended complaint) held on 2/13/03 (dn) (Entered: 04/04/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 05/13/2003 | | SCHEDULING CONFERENCE held (jg) Modified on 05/16/2003 (Entered: 05/16/2003) |
| 05/21/2003 | 136 | ANSWER with separate affirmative defenses by defendants Charles Wilkie, Joe Vessels, Darrell Barnes, Teryl Shryack, Patrick Merrill, David Stimson, Michael Miller, Gene Leone, BLM to second amended complaint [76-1] (dn) (Entered: 05/22/2003) |
| 05/21/2003 | 137 | MOTION by USA to strike portions of the second amended complaint referred to Magistrate Judge William C. Beaman (dn) (Entered: 05/22/2003) |
| | * * * * * | |
| 05/30/2003 | 141 | MOTION by defendants Gene Leone, Michael Miller, David Stimson, Patrick Merrill, Teryl Shryack, Darrell Barnes, Joe Vessels, Wilkie for order to require RICO state- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | ment referred to Magistrate Judge William C. Beaman (dn) (Entered: 05/30/2003) |
| 06/04/2003 | 142 | RESPONSE by plaintiff Harvey Frank Robbins Jr to defendant USA's motion to strike portions of the second amended complaint [137-1] (dn) (Entered: 06/05/2003) |
| 06/11/2003 | 143 | REPLY by defendants to response to motion to strike portions of the second amended complaint [137-1] (jlg) (Entered: 06/11/2003) |
| 06/13/2003 | 144 | RESPONSE by plaintiff to motion for order to require RICO statement [141-1] (jlg) (Entered: 06/13/2003) |
| 06/25/2003 | 145 | NOTICE by USA of death of defendant Joseph T "Joe" Vessels (dn) (Entered: 06/25/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 06/25/2003 | 146 | REPLY by USA to plaintiff's response to motion for order to require RICO statement [144-1] (dn) (Entered: 06/25/2003) |
| 06/26/2003 | 147 | ORDER OF PARTIAL DISMISSAL AND AMENDING CAPTION by Honorable Clarence A. Brimmer; matter is dismissed as to defendant Joseph T Vessels, caption shall be amended to delete Joe Vessels as a defendant individually and as an employee of the BLM terminating party Joe Vessels (cc: all counsel 6/26/03) (dn) (Entered: 06/26/2003) |
| 07/09/2003 | 148 | ORDER by the Honorable William C Beaman granting [141] Motion for Order requiring RICO Statement; it is ordered that plaintiff is required to file a RICO Statement by 7/21/03 (cc: all counsel on 7/9/03). (jlg,) (Entered: 07/09/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 07/09/2003 | 149 | ORDER by the Honorable William C Beaman granting [137] Motion to Strike Portions of the [76] Second Amended Complaint; it is ordered that paragraphs 112 through 135 of the second amended complaint be stricken (cc: all counsel on 7/9/03). (jlg,) (Entered: 07/09/2003) |
| | | * * * * * |
| 07/18/2003 | 152 | NOTICE by Plaintiff Harvey Frank Robbins Jr of Filing RICO Statement (dn,) (Entered: 07/21/2003) |
| | | * * * * * |
| 09/24/2003 | 160 | MOTION AND MEMORANDUM IN SUPPORT for Leave to File Third Amended Complaint by Plaintiff Harvey Frank Robbins Jr (Proposed order submitted) (dn,) (Entered: 09/25/2003) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/08/2003 | 171 | RESPONSE to plaintiff's [160] MOTION AND MEMORANDUM IN SUPPORT for Leave to File Third Amended Complaint filed by Defendants Darrell Barnes, Gene Leone, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie. (dn,) (Entered: 10/08/2003) |
| 10/10/2003 | 172 | MOTION for Summary Judgment by Defendants Darrell Barnes, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie (jlg,) (Entered: 10/10/2003) |
| 10/10/2003 | 173 | PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW re [172] MOTION for Summary Judgment filed by Defendants Darrell Barnes, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Charles Wilkie. (jlg,) (Entered: 10/10/2003) |
| 10/10/2003 | 174 | MEMORANDUM in Support of [172] MOTION for Summary Judgment filed by Defendants Darrell Barnes, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie. (dn,) (Entered: 10/14/2003) |
| | | * * * * * |
| 10/16/2003 | 176 | REPLY to Response to [171] RESPONSE to plaintiff's [160] MOTION AND MEMORANDUM IN SUPPORT for Leave to File Third Amended Complaint filed by Defendants Darrell Barnes, Gene Leone, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie. (dn, ) filed by Plaintiff Harvey Frank Robbins Jr. (sjs,) (Entered: 10/17/2003) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/20/2003 | 180 | PROPOSED STIPULATION AS TO FACTS filed by defendants Darrell Barnes, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie. (dn,) (Entered: 10/20/2003) |
| 10/20/2003 | 181 | PROPOSED STIPULATION OF FACTS filed by Harvey Frank Robbins Jr. (dn,) (Entered: 10/20/2003) |
| | * * * * * | |
| 10/27/2003 | 186 | OPPOSITION filed by Plaintiff Harvey Frank Robbins Jr to [172] MOTION for Summary Judgment by Defendants Darrell Barnes, Gene Leone, Patrick Merrill, Michael Miller, Teryl Shryack, David Stimson, Charles Wilkie. (dn,) (Entered: 10/27/2003) |
| 10/27/2003 | 187 | PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW re Plaintiff's Oppo- |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | sition to Defendants' Motion for Summary Judgment. (dn,) (Entered: 10/27/2003) |
| 10/27/2003 | 188 | NOTICE of Filing Exhibit Index (with exhibits 1-248) by Plaintiff Harvey Frank Robbins Jr re [186] Opposition to Defendants' Motion for Summary Judgment (dn,) (Entered: 10/27/2003) |
| | | * * * * * |
| 10/31/2003 | 190 | Minutes: Motion Hearing held on 10/31/2003, taking under advisement [172] Motion for Summary Judgment and taking under advisement [177] appeal of Magistrate order. (Court Reporter Jan Dew-Harris.) (he,) (Entered: 10/31/2003) |
| | | * * * * * |
| 10/31/2003 | 193 | MOTION for Reconsideration of Magistrate's [179] Order on Motion for Leave to File Third Amended Complaint by Plaintiff Harvey Frank |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Robbins Jr; referred to the Honorable William C Beaman. (dn,) (Entered: 10/31/2003) |
| | | * * * * * |
| 11/03/2003 | 195 | ORDER by the Honorable Clarence A Brimmer granting [193] Plaintiff's Motion for Reconsideration of [193] MOTION for Reconsideration re [179] Order on Motion for Leave to File Third Amended Complaint filed by Harvey Frank Robbins (cc: all counsel on 11/3/2003). (dn,) Modified on 11/4/2003 (dn,) (Entered: 11/03/2003) |
| | | * * * * * |
| 11/04/2003 | 197 | THIRD AMENDED COMPLAINT filed by Harvey Frank Robbins Jr against Defendants David Wallace, Darrell Barnes, Gene Leone, Michael Miller, Teryl Shryack and Charles Wilkie. (dn,) (Entered: 11/07/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 11/04/2003 | 198 | NOTICE by Plaintiff Harvey Frank Robbins Jr of Supplemental Documents Supporting Plaintiff's [186] Opposition (Response) to Defendants' Motion for Summary Judgment (documents consist of deposition and trial transcripts; in separate box) (dn,) (Entered: 11/07/2003) |
| | * * * * * | |
| 11/12/2003 | 204 | PRETRIAL CONFERENCE MEMORANDUM by Plaintiff Harvey Frank Robbins Jr. (sjlg, ) (Entered: 11/13/2003) |
| 11/13/2003 | 205 | SECOND SUPPLEMENT re [204] PRETRIAL CONFERENCE MEMORANDUM by Plaintiff Harvey Frank Robbins Jr. (sjlg,) filed by Plaintiff Harvey Frank Robbins Jr. (js,) (Entered: 11/13/2003) |
| | * * * * * | |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 11/12/2003 | 206 | SUPPLEMENT re [204] PRETRIAL CONFERENCE MEMORANDUM filed by Plaintiff Harvey Frank Robbins Jr. (jlg,) (Entered: 11/13/2003) |
| 11/12/2003 | 207 | FINAL PRETRIAL CONFERENCE MEMORANDUM by Defendants Darrell Barnes, Gene Leone, Gene Leone, Michael Miller, Teryl Shryack, Charles Wilkie. (jlg,) (Entered: 11/13/2003) |
| | * * * * * | |
| 11/17/2006 | 210 | RESPONSE to Motion re [196] MOTION for Reconsideration of re [195] Court's Order on Motion for Reconsideration to file third amended complaint and to strike said complaint, by Defendants Darrell Barnes, Gene Leone, Michael Miller, Teryl Shryack, Charles Wilkie referred to the Honorable William C Beaman. (js,) filed |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | by Plaintiff Harvey Frank Robbins Jr. (js,) (Entered: 11/18/2003) |
| | | * * * * * |
| 12/03/2003 | 219 | ORDER ON VARIOUS MOTIONS by the Honorable Clarence A Brimmer ;denying [196] Motion for Reconsideration of Court's Order Granting Plaintiff Leave to File Third Amended Complaint and to Strike said Complaint and granting [208] Plaintiff's MOTION for Leave to allow filing of additional factual evidence in support of plaintiff's opposition to defendants' motion for summary judgment. Said additional depositions to be filed by 12/15/2003. (cc: all counsel on 12/3/2003). (dn,) (Entered: 12/03/2003) |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 12/04/2003 | 220 | SUPPLEMENT re [219] ORDER ON VARIOUS MOTIONS by the Honorable Clarence A Brimmer; denying [196] Motion for Reconsideration of Court's Order Granting Plaintiff Leave to File Third Amended Complaint and to Strike said Complaint and granting [208] Plaintiff's MOTION for Leave to allow filing of additional factual evidence in support of plaintiff's opposition to defendants' motion for summary judgment. Said additional depositions to be filed by 12/15/2003. (cc: all counsel on 12/3/2003). (dn,) (js,) (Entered: 12/04/2003) |
| | | * * * * * |
| 12/11/2003 | 224 | SUPPLEMENT/ADDITIONAL Factual Evidence in support of plaintiff's [186] OPPOSITION to [172] MOTION for Summary Judgment filed by Plaintiff Harvey |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Frank Robbins Jr. (jlg,) (Entered: 12/15/2003) |
| | | * * * * * |
| 01/20/2004 | 233 | ORDER by the Honorable Clarence A Brimmer denying [172] Motion for Summary Judgment (cc: all counsel 1/20/04).(jlg,) (Entered: 01/21/2004) |
| | | * * * * * |
| 02/10/2004 | 237 | NOTICE OF APPEAL as to 233 Order on Motion for Summary Judgment by Defendants Darrell Barnes, Gene Leone, Gene Leone, Michael Miller, Teryl Shryack, Charles Wilkie. Filing fee waived. (cc: all counsel on 2/11/04).(sjlg,) (Entered: 02/11/2004) |
| | | * * * * * |
| 02/11/2004 | 239 | ORDER STAYING CASE PENDING APPEAL ON QUALIFIED IMMUNITY by the Honorable Clarence A Brimmer re 237 Notice of Appeal filed by Darrell Barnes, Charles Wilkie, |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | Teryl Shryack, Gene Leone, Michael Miller. (cc: all counsel 2/11/2004.) (dn,) (Entered: 02/11/2004) |
| | | * * * * * |
| 03/24/2006 | 249 | MANDATE of USCA affirming decision of USDC 237 Notice of Appeal filed by Darrell Barnes, Charles Wilkie, Teryl Shryack, Gene Leone, Michael Miller. (sjs,) (Entered: 03/24/2006) |
| | | * * * * * |
| 03/27/2006 | 256 | ORDER by the Honorable Clarence A. Brimmer granting 253 Motion to Extend Stay Pending Appeal on Qualified Immunity; case stayed until 6/13/2006. (cc: all counsel 3/27/2006). (sdn,) (Entered: 03/28/2006) |
| | | * * * * * |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 04/07/2006 | 258 | MOTION by Plaintiff Harvey Frank Robbins, Jr for Reconsideration of 256 Order Extending Stay Pending Appeal on Qualified Immunity. (Attachment #1 - Proposed Order) (sdn,) (Entered: 04/10/2006) |
| | * * * * * | |
| 04/21/2006 | 261 | ORDER by the Honorable Clarence A. Brimmer denying Plaintiff's 258 Motion for Reconsideration of Order Extending Stay Pending Appeal on Qualified Immunity; and denying plaintiff's motion to set scheduling conference. (cc: all counsel 4/21/2006). (sdn,) (Entered: 04/21/2006) |
| | * * * * * | |
| 08/14/2006 | 271 | ORDER by the Honorable Clarence A. Brimmer granting 270 Motion to Extend Stay Pending Appeal on Qualified Immunity; stay continued until US Supreme Court decides defendants' petition for |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| | | writ of certiorari (cc: all counsel on 8/15/2006.) (sdn,) (Entered: 08/15/2006) |
| | | * * * * * |
| 09/25/2006 | 274 | APPEAL ORDER from USCA: Mr. Robbins has "not established that his right to immediately proceed is clear and indisputable." Accordingly his request for mandamus is denied. Appeal number 06-8071. (sjs,) (Entered: 09/25/2006) |

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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No. 98-CV-201B

HARVEY FRANK ROBBINS, PLAINTIFFS

*v.*

CHARLES WILKIE, JOE VESSELS, DARRELL BARNES, TERYL SHRYACK, PATRICK MERRILL, DAVID STIMSON, MICHAEL MILLER, GENE LEONE, AND JOHN DOES 1 THROUGH 20, DEFENDANTS

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[May 9, 2001]

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**ORDER ON MOTION TO DISMISS**

This is a cause of action brought as a *Bivens* claim and under the Racketeer Influenced and Corrupt Organizations Act ("RICO") seeking compensatory damages, as well as declaratory and injunctive relief. Now before the Court is Defendants' Motion to Dismiss Second Amended Complaint of Plaintiff, pursuant to Fed. R. Civ. P. 12. After reading the briefs and being fully advised of the premises, the Court FINDS and ORDERS as follows:

Background

Plaintiff Harvey Frank Robbins ("Robbins") is the owner of the High Island Ranch in Hot Springs County Wyoming, and a grazing permittee within the Big Horn Basin Resource Area. Operations at the High Island Ranch involve livestock grazing as well as guest ranch services.

Robbins acknowledges that his predecessor in interest granted the BLM an easement across his land, but contends the Bureau of Land Management ("BLM") failed to record this easement. Robbins has since refused to grant the BLM a similar easement.

Robbins alleges that he was subjected to harassment by BLM employees in an attempt to coerce him into grating the easement in question. According to Robbins, BLM officials threatened to revoke a right-of-way held by Robbins across BLM land unless he granted the easement that BLM wanted. Robbins alleges that Defendants singled him out for discriminatory treatment and harassment in retribution for his refusal to grant an easement. Inter alia, Robbins alleges that the Defendants canceled his right-of-way across BLM land, provoked disputes between Robbins and his neighbors, and suspended Robbins' Special Recreational Use Permit.

On or about July 11, 1997, Defendants Shryack and Merrill attempted to enter a public land area adjacent to Robbins' property via the asserted easement to conduct fence maintenance, where they were confronted by Robbins. Robbins refused them entrance, and tore up the copy of the fence easement Shryack and Merrill had in their possession.

Robbins contends he was subsequently haled into BLM's offices, where he was subjected to an interrogation by Defendants Barnes, Vessels, Stimson and Miller without the benefit of counsel. After further investigation by defendants Stimson and Miller the BLM referred the case to the United States Attorney's Office. Robbins was charged with interfering with a federal officer, and was acquitted following a three day trial.

On November 6, 1998, Plaintiff filed a five count First Amended Complaint. Robbins alleged that the Defendants violated RICO and sought recovery under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on BLM's allegedly meritless prosecution of Robbins and the BLM's efforts to pressure him to grant BLM an easement. On October 14, 1999, Robbins filed a notice of voluntary dismissal of some of his claims, and requested leave to file a Second Amended Complaint.

Robbins' Second Amended Complaint does not list BLM, the Department of Interior, or the United States as parties. Instead it lists eight current and former employees of BLM, as well as "John Does 1 through 20."[1] The individual Defendants are sued under RICAO and *Bivens* for declaratory and injunctive relief, as well as compensatory damages.

In their Motion To Dismiss, Defendants assert qualified immunity with regard to both the RICO and *Bivens* claims. Defendants also contend the RICO claims are ripe for dismissal, since they are subject to statutory defenses and fail to state a claim under the RICO guidelines.

Standard of Review

Defendants contend Robbins has not stated a claim for which relief can be granted.

> "Dismissal is inappropriate under Fed. R. Civ. P. 12(b)(6) unless the Plaintiff can prove no set of facts in support of his claims to entitle him to relief. The court must accept as true all the factual allegations in the com-

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[1] Robbins' Amended Complaint does not indicate whether the John Does are sued in their individual or official capacities.

plaint, construe them in a light of most favorable to the Plaintiff, and resolve all reasonable inferences in plaintiff's favor."

*Seamons* v. *Snow*, 84 F.3d 1226, 1231-32 (10th Cir. 1996)

Analysis

I. Racketeer Influenced and Corrupt Organization Act Claim

Robbins alleges that in their effort to secure an easement through his property, the individual Defendants engaged in a series of acts prohibited under the Racketeer Influenced and Corrupt Organization Act ("RICO"). 118 U.S.C. § 1961, *et seq.* "To survive a Rule 12(b) (6) motion, a civil RICO claim must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity". *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (quotations omitted). Additionally, a plaintiff under RICO must show damage to business or property in order to have standing. *Sedima. S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). Defendants argue dismissal is proper because Robbins has failed to meet these RICO requirements.

According to Defendants, Robbins has not demonstrated acts on behalf of an "enterprise" as required under the RICO statute. An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961 (4). Robbins contends the BLM is the enterprise intended to benefit from acquisition of the contested easement.

Although no cases address the question of whether federal agencies qualify as enterprises under RICO, a majority of circuits have allowed RICO claims for abusive practices

committed on behalf of state and local governments. *See United States v. Freeman*, 6F.3d 586, 596-97 (9th Cir. 1993), *United States v. Thompson*, 669 F.2d 1143, 1149 (6th Cir. 1982). Using RICO to deter abuse of official right by government actors is consistent with "certain of RICO'S substantive goals, which appear to be directed particularly toward government entities". *United States v. Angelilli*, 660 F.2d 23, 31 (2nd Cir. 1981). Therefore, for the purposes of this Order, the Court concludes the BLM qualifies as an enterprise under RICO. Next, Defendants contend Robbins has failed to allege with sufficient particularity acts of racketeering which constitute a pattern. To establish pattern of activity under RICO, predicate acts must be "related, and . . . amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tele.*, 492 U.S. 229, 239 (1989); *see also Sil-Flo, Inc.* V. *SFHC*, 917 F.2d 1507 (10th Cir. 1990).

Robbins responds that he has pled numerous acts taken by the Defendants ostensibly to acquire the easement. These actions include cancellation of Robbins' Special Recreational Use Permit and a grazing permit, refusal to repair section of an access route owned by BLM, refusal to approve a right-of-way requested by Robbins, threatening to cancel another right-of-way, inciting conflicts between Robbins and his neighbors, and engaging in malicious prosecution of Robbins.

Considering these allegations in the light most favorable to the Plaintiff, Robbins has at least made a facial allegation of a pattern of racketeering, for the purposes of RICO. RICO defines racketeering activity in part as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical." 18 U.S.C.

§ 1961(A). Robbins contends that the Defendants' actions constitute attempted violations of the Hobbs Act, 18 U.S.C. § 1951 *et seq.*, and the Wyoming blackmail law, Wyo. Stat. § 6-2-402.

Even assuming this is to be the case, however, Robbins has absolutely failed to carry his burden of pleading any harm to business or property as a result of the alleged RICO violation. See 18 U.S.C. § 1962. Although his concern for the integrity of his property rights is understandable, Robbins has not alleged damages to his business or property with a demonstrable effect on interstate commerce.[2] "The [RTCO] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L.*, 473 U.S. at 496.

Robbins has not, in fact, been forced to forfeit any control to his property, nor has he demonstrated any deleterious effects to his ranching our tourism operations. The decision by the BLM to deny Robbins permits is well within agency discretion, and does not constitute the violation of any property right held by Robbins. *See Pub. Lands Council v. Babbitt*, 529 U.S. 728, 733 (2000). It is also apparent that the Defendants cannot be held liable for any conflicts between Robbins and his neighbors. Robbins' inability allege any tangible harm to his business or property renders his RICO claim nonviable.

The potent remedies available for a civil claim under RICO are available only under certain delineated circumstances. *See* 18 U.S.C. 1962. Mr. Robbins' problems with

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[2] RICO is a constitutional exercise of federal Commerce Clause power only to the extent it regulates activity with an effect on interstate commerce. *United States* v. *Muyet*, 994 F. Supp. 501, 524 (S.D.N.Y. 1998).

employees of the BLM do not rise to such a level. Therefore, Robbins lacks standing to state a claim for which relief may be granted under RICO.

II. *Bivens* Claims

Claims for monetary damages for constitutional violations by federal officers are cognizable based on the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Robbins alleges the Defendants conspired to deprive him of his constitutional rights through malicious prosecution and abuse of process.

Defendants counter that the Plaintiff is attempting to resurrect what are essentially common law tort claims in a *Bivens* cause of action. To the extent that Robbin's claims are cognizable, the Defendants contend he has other avenues of relief available, and therefore a *Bivens* action must be rejected. *Bivens*, 403 U.S. at 397. "When the design of a Government Program suggests that Congress has provided what it considers adequate remedial mechanisms for the constitutional violations that may occur in the course of it's administration, [federal courts] have not created additional *Bivens* remedies." *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988); *see also Lombardi v. Small Bus. Admin.*, 889 F.2d 959, 961-62 (10th Cir. 1989) ("[W]e are of the opinion that the clear purpose of *Chilicky* and the related cases is to virtually prohibit intrusion by the Courts into the statutory scheme established by Congress.").

Here, in addition to availability of common law tort claims, Robbins may seek relief under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, or the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* Therefore, the Court finds that availability of these congressionally-created rem-

edies precludes resort to the judicially-created corrective of a *Bivens* action.

III. Qualified Immunity

Because Robbins has not satisfied the requirement for standing under RICO, or made a cognizable claim under *Bivens*, it is unnecessary for the Court to determine formally whether or not the Defendants are protected by qualified immunity. However, the Court is inclines to believe that the Defendants are so protected, is inclined to believe that the Defendants were so protected, because at the time of the events of which Robbins complains, the Defendants, as agents of the BLM, were merely doing their duties as federal officers.

Conclusion

Robbins has not shown an injury to business or property necessary to support standing for a RICO claim. Likewise, the availability of other avenues of relief bars Robbins' *Bivens* action.

THEREFORE, it is hereby ordered that Defendants' Motion to Dismiss Second Amended Complaint of Plaintiff is GRANTED.

Plaintiff's claims are DISMISSED WITH PREJUDICE.

Dated this 9th day of May, 2001.

/s/ CLARENCE A. BRIMMER
CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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Case No. 98-CV-201-B

HARVEY FRANK ROBBINS, PLAINTIFF

*v.*

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICHAEL MILLER, GENE LEONE, AND DAVID WALLACE, DEFENDANTS

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[Filed: Nov. 4, 2003]

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**THIRD AMENDED COMPLAINT**

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COMES NOW the Plaintiff, by and through undersigned counsel, and for his causes of action against the Defendants, alleges as follows:

**I. PARTIES**

1. The Plaintiff Harvey Frank Robbins (hereinafter "Robbins") is a resident of the State and District of Wyoming, residing in Hamilton Dome, Wyoming, in Hot Springs County. Plaintiff is the owner of real property known as the High Island Ranch, HD Ranch, and Owl Creek Ranch.

2. The Defendant Charles Wilkie ("Wilkie") was an employee of the United States Bureau of Land

Management ("BLM") as the Worland area manager. Defendant Wilkie was a BLM line officer. Defendant Wilkie's official duties included implementing the laws of the United States and the Department of the Interior regulations.

3. The Defendant Darrell Barnes is an employee of the United States and the BLM. Defendant Barnes is the Worland BLM District Manager. Defendant Barnes' official duties include implementing the laws of the United States and the Department of the Interior regulations.

4. The Defendant Michael Miller is an employee of the United States and the BLM. Defendant Miller is a BLM investigative and law enforcement officer whose duties include investigating alleged criminal offenses and making recommendations regarding prosecution. Defendant Miller's official duties include implementing the laws of the United States and the Department of the Interior regulations.

5. The Defendant Gene Leone was an employee of the United States and the Worland BLM. During his employment, Defendant Leone's official duties included implementing the laws of the United States and the Department of the Interior regulations.

6. The Defendant Teryl Shryack is an employee of the United States and the Worland BLM. Defendant Shryack's official duties include implementing the laws of the United States and the Department of the Interior regulations.

7. The Defendant David Wallace is an employee of the United States and the Worland BLM. Defendant Wallace's official duties include implementing the laws of the United States and the Department of the Interior regulations.

8. Mr. Joe Vessels ("Vessels") was an employee of the United States and the Worland BLM, as Assistant Area Manager. Mr. Vessels' official duties included implementing the laws of the United States and the Department of the Interior regulations. Mr. Vessels was a primary participant and conspirator involved in the allegations detailed in this complaint, and was listed as a Defendant on Plaintiff Robbins Second Amended Complaint. Mr. Vessels passed away in 2003 and, therefore, is no longer a Defendant in this case.

## II. JURISDICTION AND VENUE

9. Jurisdiction is proper in the United States District Court because this action involves claims against officers and agencies of the United States of America under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. § l346(b)(l).

10. Jurisdiction is proper in the United States District Court because this action involves claims against individual officers of the United States of America under the case of *Bivens* v. *Six Unnamed Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) which judicially recognizes actions against federal officials which parallel actions under the Civil Rights Act, 42 U.S.C. §1983; 28 U.S.C. § 1331 and under the Constitution of the United States of America.

11. Under 28 U.S.C. § 1391(e), venue is proper in the United States District Court for the District of Wyoming because the Plaintiff and the Defendants reside in the State of Wyoming and the wrongful acts complained of herein took place in the State of Wyoming.

**III. FACTS COMMON TO ALL CAUSES OF ACTION**

12. On or about the 31st day of May, 1994, Plaintiff Robbins purchased real property in Hot Springs County, Wyoming, known as the High Island Ranch, from George Nelson ("Mr. Nelson").

13. At the time Plaintiff Robbins purchased the High Island Ranch, the Worland office of the BLM was working with the Wyoming Fish and Game Commission and the U.S. Forest Service in an effort to acquire all or part of the High Island Ranch for public access and use.

14. The High Island Ranch operation, stemming from the time of Mr. Nelson's ownership and continuing to the present, involves cattle ranching, and a guest ranch operation whereby the guests participate in the operation of the ranch, including its cattle drives.

15. The property interests of the High Island Ranch acquired by Plaintiff Robbins include a substantial amount of private base property and a number of preference rights for grazing permits issued by the BLM whereby cattle owned or leased by Robbins are licensed to graze on the BLM managed lands.

16. The guest ranch activities of the High Island Ranch acquired by Robbins previously required

and were contemplated by an agreement between the High Island Ranch and the BLM whereby a special recreational use permit ("SRUP") was issued by the BLM. This SRUP allowed Robbins' paying guests to trail livestock on lands managed by the BLM.

17. The business arrangement between the BLM and the High Island Ranch, from the time of Mr. Nelson onward, has been governed by a set of documents known as a Management Plan.

18. On or about April 5, 1994, Mr. Nelson granted a non-exclusive easement to the BLM across the High Island Ranch, on a private road known as the Rock Creek Road.

19. The BLM also granted to Mr. Nelson a right-of-way to maintain a road across BLM managed lands. This road, is the only access route to a substantial parcel of private land belonging to the High Island Ranch. Unless this existing road across the BLM lands is maintained, vehicle access to this private land is not possible.

20. The BLM failed to properly record its easement of April 5 , 1994.

21. When Plaintiff Robbins purchased the High Island Ranch, he was unaware of the BLM easement. Upon acquiring title to the High Island Ranch, Plaintiff Robbins properly recorded his title.

22. The BLM's April 5, 1994 easement was extinguished when Plaintiff Robbins recorded his title to the High Island Ranch.

23. The BLM's easement was extinguished as a result of the Defendants' omissions.

24. In or around June, 1994, upon realizing that the BLM easement had been extinguished, Mr. Vessels contacted Plaintiff Robbins by telephone and demanded that he sign an easement like the one granted to the BLM by Mr. Nelson. Mr. Vessels told Plaintiff Robbins that there would be no negotiation, that Plaintiff Robbins would have to grant the BLM an easement through his property in return for a right-of-way to his property. Mr. Vessels told Plaintiff Robbins that he had no choice, he would have to give the BLM an easement one way or another.

25. In the June 1994 telephone conversation described in the previous paragraph, Mr. Vessels admitted to Plaintiff Robbins that the BLM no longer had an easement for general access across the High Island Ranch's property.

26. Defendants knew that Plaintiff Robbins' guest ranch business could not operate without the ability to maintain the right-of-way across BLM managed lands to access the High Island Ranch private property.

27. Defendants threatened to cancel the right-of-way across BLM managed lands to the High Island Ranch private property, unless Plaintiff Robbins granted an easement across his private lands to the BLM.

28. Defendants' threat to cancel Plaintiff Robbins' right-of-way was reasonably calculated to place Robbins in fear of serious financial loss if he refused to give the BLM an easement.

29. Because he feared retribution from the BLM if he refused to do so, Plaintiff Robbins told Mr. Vessels that he would consider granting an easement to the BLM, and subsequently negotiated such easement in good faith. However, Plaintiff Robbins declined to sign an easement like that signed by Mr. Nelson.

30. Upon realizing that their conduct and omissions had caused the BLM's easement to be extinguished, the Defendants began engaging in a pattern of intentionally abusive conduct for the purpose of coercing Plaintiff Robbins to re-grant the easement and to punish Plaintiff Robbins for not immediately capitulating to their demands.

31. In June of 1994, Mr. Vessels wrote twice to Plaintiff Robbins requesting permission to survey for the proposed easement across the High Island Ranch.

32. Plaintiff Robbins declined to allow the BLM to enter onto his private property for the survey.

33. Mr. Vessels disregarded Plaintiff Robbins' clear instructions and orchestrated a survey anyway. The survey was accomplished without permission and by trespass.

34. Nevertheless, through counsel, Plaintiff Robbins continued to negotiate in good faith with the BLM and Mr. Vessels regarding an easement for the BLM.

35. These negotiations were not fruitful because the BLM and Mr. Vessels insisted that Plaintiff Robbins grant a non-exclusive easement to the BLM, which could be converted to a public easement al-

lowing access across his property by any member of the public. Plaintiff Robbins was unwilling to expose his private property to trespass and vandalism by agreeing to such a non-exclusive easement.

36. On or about February 23, 1995, Mr. Vessels again demanded an easement from Plaintiff Robbins. Mr. Vessels again threatened to terminate Plaintiff Robbins' right-of-way to his property if he did not grant the BLM an easement.

37. Subsequently, Mr. Vessels and the Defendant began to single Plaintiff Robbins out for disparate and discriminatory treatment because he refused to grant the easement that Mr. Vessels demanded.

38. Mr. Vessels and the other Defendants harassed Plaintiff Robbins. For example, a policy was developed whereby the terms and conditions of the Management Plan were not followed in good faith and the BLM would refuse Plaintiff Robbins every reasonable request for flexibility.

39. Additionally, the Defendants prohibited Plaintiff Robbins from maintaining the BLM road which is necessary for Plaintiff Robbins to access a substantial portion of the High Island Ranch.

40. Under Mr. Vessels' direction, the Defendants also began to make trouble for Plaintiff Robbins with his neighbors. On August 31, 1995, Defendant Gene Leone urged Mr. Pennoyer, Mr. Robbins' neighbor and private citizen, to file a criminal complaint with the Sheriff and to have criminal charges filed against Mr. Robbins.

41. On that same date, Defendant Leone provoked a separate incident between Plaintiff Robbins and an elderly neighbor lady named LaVonne Pennoyer, whereby Mrs. Pennoyer was incited to violence against Plaintiff Robbins. Specifically, Mrs. Pennoyer drove a motor vehicle which struck Plaintiff Robbins and the horse on which he was riding.

42. Both of these incidents were intended to support Defendant Leone's statements to fellow BLM employees that he was going to "bury" Plaintiff Robbins and also get Plaintiff Robbins' grazing permits.

43. Subsequently, using the incident that Defendant Leone had provoked with Mrs. Pennoyer as an excuse, Mr. Vessels and Defendants Leone and Barnes suspended Plaintiff Robbins' Special Recreation Use Permit ("SRUP"). Without this SRUP, Plaintiff Robbins could not, at that time, conduct his guest ranch cattle drives which were the primary source of income for the High Island Ranch.

44. The Defendants also embarked upon a pattern of frivolous trespass prosecutions. In these prosecutions, Defendants Shryack, Barnes and Wilkie and Mr. Vessels asserted that Plaintiff Robbins' cattle were in trespass against the BLM, when they were located on Plaintiff Robbins' own private property, under the hypothesis that the High Island Ranch cattle allegedly could "access" the adjoining and unfenced public lands. When the BLM brought these charges, the BLM had no evidence that Mr. Robbins' cattle were in fact on

BLM lands at a time when they were not permitted to be there.

45. Likewise, the Defendants prosecuted Plaintiff Robbins for "willful" livestock grazing trespass, when such trespasses occurred through actions which were admittedly not Plaintiff Robbins' fault. For example, Plaintiff Robbins would be cited for "willful" trespass when a third party broke down a cattle guard, allowing Plaintiff Robbins cattle to escape onto BLM lands. Likewise, Plaintiff Robbins was cited for "willful" trespass when his cattle escaped through a fence intentionally designed by the BLM to allow antelope and other animals to escape, and after the BLM's assurance that incidental trespass related to the fence would not be cited.

46. The Defendants also trespassed Plaintiff Robbins' livestock, but not his neighbors livestock, for the exact same circumstances and sometimes for the exact same incident. Thus the Defendants intentionally treated Plaintiff Robbins differently than other similarly situated permittees: often applying BLM regulations differently to Plaintiff Robbins than they were applied to neighboring permittees.

47. For example, in 1997, the Defendants issued a decision fining Plaintiff Robbins approximately $1,600.00 for repairing a road on BLM lands that washed out. Although Plaintiff Robbins requested, the BLM refused to repair the road even though the BLM knew the road was the only access route to portions of private property belonging to the High Island Ranch. In 1992, Mr. Nel-

son, the prior owner of the High Island Ranch, also repaired this road under similar circumstances, but the BLM did not levy any fines or citations against Mr. Nelson.

48. The Defendants have used these multiple trespass allegations as alleged justification for revoking Plaintiff Robbins' grazing permits, for refusing to transfer Plaintiff Robbins' Owl Creek grazing permit, and for issuing other adverse decisions against Plaintiff Robbins. Mr. Vessels and Defendants Barnes, Wilkie, Shryack and Wallace have willfully and intentionally participated in these schemes, for the purpose of extorting Plaintiff Robbins and punishing Plaintiff Robbins for exercising his private property rights and for failing to capitulate to the Defendants' demands.

49. The Defendants also entered into a scheme to intentionally lie to and mislead Plaintiff Robbins about his legal rights under BLM regulations, and about his legal right to appeal adverse decisions. For example, the Defendants told Plaintiff Robbins that he could not appeal certain adverse decisions, that if he did not settle "willful" trespass allegations he would immediately lose his grazing privileges, that "willful" trespass decisions could not and would not be used against him in the future, and that appealing adverse decisions would be fruitless because appealing would be time consuming, expensive, and because Plaintiff Robbins would be out of business in the mean time. These statements were, as a matter of law, false. The Defendants intentionally and knowingly made these false statements to Plaintiff Robbins in an

effort to convince Plaintiff Robbins not to appeal adverse allegations and decisions, which the Defendants intentionally and knowingly intended to use against Plaintiff Robbins to eventually cancel all of Plaintiff Robbins' grazing privileges. Defendants' scheme to set Plaintiff Robbins up was successful in that the Defendants did indeed use these settled and un-appealed adverse decisions as justification to attempt to cancel all of Plaintiff Robbins' grazing privileges. Defendants Barnes, Wilkie, Shryack, Leone and Mr. Vessels all participated in these schemes.

50. Defendants Leone, Shryack, Barnes, Miller and Mr. Vessels also participated in a scheme to harass Plaintiff Robbins while on cattle drives with paying guests. The Defendants would follow the cattle drives in trucks, photographing and videotaping guests. The above named Defendants also trespassed on Plaintiff Robbins' private property during these incidents.

51. Defendants Barnes and Miller, and Mr. Vessels, also broke into Plaintiff Robbins' guest lodge on Plaintiff Robbins' private property.

52. Defendants orchestrated the improper and abusive conduct described above in an effort to use the sovereign power of the United States to coerce Plaintiff Robbins to grant the nonexclusive easement that they demanded and to punish Plaintiff Robbins for exercising his private property rights. In fact, Ed Parodi, a BLM employee was sent to explain what the BLM would do to Plaintiff Robbins if he did not acquiesce to their demands. The BLM employee stated "if you keep butting heads,

things are going to get pretty ugly" and "they have more resources, more time and money than you. If you keep butting heads with them it will come to war." The same BLM employee stated to Plaintiff Robbins that the employee was sick of doing the BLM's dirty work, and that the BLM was going to give Plaintiff Robbins a "hardball education."

53. Plaintiff Robbins at all times relevant hereto had been willing to grant the BLM permission to cross his lands for legitimate, stated purposes.

54. At all times relevant hereto, the BLM had a recorded fence maintenance easement (the "Fence Easement"), allowing the BLM to use the Rock Creek Road for access to a 276-foot strip of fencing on a remote comer of a parcel owned by Plaintiff Robbins.

55. The Fence Easement provided the BLM access across the Rock Creek Road on the High, Island Ranch for the limited purpose of maintaining and repairing the 276 feet of fence.

56. Tile Fence Easement does not grant the BLM the right to enter onto portions of the High Island Ranch outside of the Rock Creek Road.

57. The Fence Easement does not provide the BLM a general right of access across the Rock Creek Road on the High Island Ranch for any purpose other than maintenance of the 276 foot fence.

58. On various occasions, Plaintiff Robbins granted Defendants limited permission to enter onto Plaintiffs private property at specific times, to go directly to stated places for stated purposes.

59. At no time did Plaintiff Robbins grant Defendants unlimited access to Plaintiff Robbins' private property.

60. Certain of the aforementioned trespass notices against Plaintiff Robbins were issued on dates and at times on which Plaintiff Robbins had given permission to the BLM for entry onto his land at stated places and for stated purposes.

61. In each case, the location of trespass "investigation" was outside the scope of the permitted access. By traversing portions of Plaintiff Robbins' private land where they were not permitted, for the purpose of investigating the alleged trespass, Defendants trespassed on Plaintiff's private lands.

62. On or about June 26, 1997, Defendant Shryack went onto Plaintiff Robbins' private land with a copy of the Fence Easement in her possession and trespassed outside of the Rock Creek Road for purposes other than repair and maintenance of the 276 feet of fence. Defendant Shryack did not encounter Plaintiff Robbins on this date.

63. As a result of the BLM's pattern of abuse, retaliation and other efforts to coerce Plaintiff Robbins to grant a non-exclusive easement across his private property, including the unfounded trespass prosecutions and the abuse of permission to enter his lands, on or about the 7th day of July, 1997, Plaintiff Robbins informed the BLM, in writing, that its employees could no longer enter onto his land without written permission.

64. The Defendants were angered further by Plaintiff Robbins' assertion and exercise of his private

property rights. Accordingly, the decision was made that the Defendants would attempt to utilize the Fence Easement to fraudulently obtain access onto Plaintiff Robbins' lands.

65. On or about the 11th day of July, 1997, Plaintiff Robbins encountered Defendant Shryack traveling in a pickup truck on the Rock Creek Road, on propeny bordering the High Island Ranch.

66. Defendant Shryack's destination was an area of BLM property which could only be accessed by trespassing on Plaintiff Robbins' private property.

67. Plaintiff Robbins told Defendant Shryack that she did not have permission to trespass on Plaintiff Robbins' private property.

68. In response, Defendant Shryack produced a copy of the Fence Easement and stated that the Easement gave the BLM a general right to enter onto Plaintiff Robbins' private property without permission.

69. The Fence Easement did not give the Defendants permission to access Plaintiff Robbins' property to go to the place, or for the purpose, Defendant Shryack was going to go onto Plaintiff Robbins' property.

70. Defendant Shryack knew or should have known that the Fence Easement did not grant her or other BLM employees the rights of access that she represented to Plaintiff Robbins.

71. Defendant Shryack knowingly misrepresented the scope of the Fence Easement to Plaintiff Robbins. On July 11, 1997, Plaintiff Robbins tore up the

copy of the Fence Easement and told Defendant Shryack to turn around and leave.

72. Without any protest or dispute and without attempting to do otherwise, Defendant Shryack turned around and left.

73. At no time during the July 11, 1997 encountered did Plaintiff Robbins assault, apply force to, or threaten Defendant Shryack with harm. In fact, Defendant Shryack stated that Plaintiff Robbins did not assault her or threaten to assault her.

74. Subsequently, on or about July 21, 1997, Defendant Barnes and Mr. Vessels asked Plaintiff Robbins to come to their office allegedly to discuss management of his grazing allotment.

75. A concealed purpose for Defendant Barnes and Mr. Vessels arranging a meeting with Plaintiff Robbins was to subject hm to a surprise interrogation by Defendant Miller.

76. Defendant Miller, without offering Plaintiff Robbins the opportunity to request the presence of legal counsel, interrogated Plaintiff Robbins after he met with Defendants Barnes and Mr. Vessels.

77. On various occasions since Plaintiff Robbins acquired the High Island Ranch, Defendants have used the Rock Creek Road for purposes outside the scope of the Fence Easement and have entered onto portions of Plaintiff Robbins' private property where they had no legal right to be.

78. Based upon this investigation, the United States charged Plaintiff Robbins with a crime. A jury acquitted Plaintiff Robbins of any wrongdoing after approximately 20 minutes of deliberation.

79. From 1995 to 2002, the Defendants levied dozens of adverse allegations and decisions against Plaintiff Robbins. The intended purpose of these adverse decisions was to extort an easement from Plaintiff Robbins, and to punish Plaintiff Robbins for exercising his private property rights and for failing to capitulate to the Defendants' demands. These adverse decisions where eventually used by the Defendants as justification to cancel all of Plaintiff Robbins' gazing privileges. In 1999, the Defendants canceled Plaintiff Robbins' High Island grazing permit. In 2000, the Defendants refused to transfer Plaintiff Robbins' Owl Creek grazing permit from the prior owning to Plaintiff Robbins. In 2002, the Defendants cancelled, in part, Plaintiff Robbins' HD grazing permit.

80. In 2002, Plaintiff Robbins entered into good faith negotiations with the U.S. Department of the Interior regarding all of these adverse decisions. In fact, the Department of the Interior essentially took away the responsibility for participating in these negotiations from the Defendants, especially Defendant Barnes, and negotiated with Plaintiff Robbins despite the protests of the Defendants. Plaintiff Robbins complained to the Department of the Interior that the Defendants had treated lim unfairly and illegally, and that the adverse decisions levied against him were frivolous. Plaintiff Robbins continued these negotiations until 2003, whereupon he entered into a settlement agreement with the Department of the Interior. The settlement agreement stayed all of the adverse decisions levied against Plaintiff Robbins, provided for oversight of the Defendants and the

Worland BLM regarding any future allegations of wrongdoing, and required the Defendants to consult and coordinate with Plaintiff Robbins regarding any such allegations. The settlement agreement states that all adverse decisions against Plaintiff Robbins will be dismissed after an approximate two year period, provided there is no proof of wrongdoing by Plaintiff Robbins during that time period.

81. In 2002, Defendants Barnes, Shryack, and Wallace actively lobbied against and attempted to derail Plaintiff Robbins ongoing settlement negotiations. Early in 2002, these Defendants levied multiple trespass allegations against Plaintiff Robbins. Shortly thereafter, the Department of the Interior began oversight of the Defendants' activities, instructing the Defendants to cease issuance of adverse decisions against Plaintiff Robbins. The Defendants nonetheless continued to levy allegations of wrongdoing against Plaintiff Robbins and take other actions, in an attempt to derail the settlement negotiations. For example, during the summer of 2002, Defendants Shryack and Wallace spent time riding in an aircraft over Plaintiff Robbins' ranch with the express intent and purpose to find livestock in trespass or to find any other alleged wrongdoing by Plaintiff Robbins. Throughout this period of time, the Defendants continually lobbied the Department of the Interior with unsubstantiated allegations of wrongdoing by Plaintiff Robbins. These actions are part of the Defendants' ongoing efforts to extort and punish Plaintiff Robbins.

82. In early 2003, the settlement between Plaintiff Robbins and the Department of the Interior was signed.

83. Defendants Barnes, Shryack and Wallace continued to levy frivolous allegations of wrongdoing against Plaintiff Robbins in an attempt to undo the settlement agreement. These efforts are ongoing.

84. Defendants Barnes and Wallace attempted to interfere with the settlement agreement by actively lobbying and assisting environmental groups in suing the Department of the Interior over the settlement agreement. Prior to the settlement agreement, environmental groups had never expressed a written interest in Plaintiff Robbins' grazing allotments. Immediately after the settlement agreement was signed, at least four environmental groups have expressed an interest in seeing the settlement agreement revoked. At least one of these groups has filed a notice of intent to sue the Department of the Interior regarding the settlement agreement. Defendants Barnes and Wallace have actively encouraged, lobbied and aided these environmental groups in their opposition to the settlement agreement and Plaintiff Robbins.

85. Defendants Barnes and Wallace also have attempted to interfere with the settlement agreement by making false statements to the press. For example, Defendant Wallace has, on several occasions, been quoted in various newspaper articles that Plaintiff Robbins is in violation of the terms of his settlement agreement. The Defendant has intentionally made these false statements in an effort to gamer public support against the

settlement agreement and to personally liable and slander Plaintiff Robbins. Upon information and belief, these efforts are ongoing.

86. Defendants Leone and Wilkie have retired from the BLM and, as such, are no longer directly involved in issuing adverse decisions against Plaintiff Robbins. Nonetheless, they continue to be involved in schemes to punish and extort Plaintiff Robbins. For instance, after the settlement agreement was signed, Defendant Leone contacted the organization known as "Public Employees for Environmental Responsibility" ("PEER"). According to PEER, PEER provides legal representation to public employees who are PEER members, who are attempting to protect the environment through "anonymous activism." Despite the fact that Defendant Leone claims that he is not a member of PEER, is no longer a public employee, and claims to have nothing, to do with environmental activism, Defendant Leone actively lobbied PEER attorneys to sue Plaintiff Robbins personally for "malicious prosecution."

87. Defendant Leone then contacted Defendants Shryack, Barnes and Wilkie, encouraging them to participate in this latest scheme against Plaintiff Robbins. Defendants Barnes and Wilkie encouraged Defendant Leone's efforts and said that they would participate in any such lawsuit. Defendant Shryack not only encouraged Defendant Leone's efforts, but actively participated in them, contacting a PEER attorney at least three times, and encouraging him to sue Plaintiff Robbins for "harassment." Like Defendant Leone, Defendant

Shryack claims to not be a PEER member or in any way interested in "anonymous" environmental activism.

88. The PEER scheme has apparently worked. While PEER has not yet sued Plaintiff Robbins personally, PEER has lodged a formal complaint with the Office of Inspector General, alleging that the settlement agreement is illegal and should be revoked.

89. Defendant Wallace has now become involved in the PEER scheme, spending at least an entire day speaking with an investigator from the Office of Inspector General.

90. In summary, the Defendants have now spent nearly nine years involved in various threats and schemes against Plaintiff Robbins. These efforts have cost Plaintiff Robbins millions of dollars in damages, have jeopardized Plaintiff Robbins livelihood, and have caused an enormous amount of stress and to Plaintiff Robbins and his family. The Defendants' efforts have been and continue to be intentionally designed to extort Plaintiff Robbins and to punish Plaintiff Robbins for failing to capitulate to the demands of the Defendants.

## IV. CLAIMS FOR RELIEF

### *Count One: Violation of the Racketeer Influenced And Corrupt Organization Act, 18 U.S.C. §§ 1961 through 1968*

91. Plaintiff realleges each and every allegation of paragraphs 1 through 90 above, and incorporates the same as if set fully set forth, and for a cause of action against the Defendants, alleges as follows:

92. Under the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. §§ 1961 through 1968, it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. §1962(c).

93. "Racketeering activity" includes "any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A) 94. "Racketeering activity" also includes "any act which is indictable under . . . [28 U.S.C.] section 1951 (relating to interference with commerce, robbery, or extortion) . . . ." 18 U.S.C. § 1961(b).

95. "Pattern of racketeering activity" means "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(b).

96. Title 18 U.S.C. § 1951, states, "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion or attempts or conspires to do so . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

97. Under U.S.C. § 1951, "'extortion' means the obtaining of property from another, with his consent, induced by . . . color of official right."

98. Under Wyoming State law, "[conduct denoted blackmail . . . constitutes a single offense embracing the separate crimes formerly known as blackmail and extortion." Wyo. Stat. § 6-2-402(e).

99. Under Wyoming State law, "[a] person commits blackmail if' with the intent to obtain property of another or to compel action or inaction by any person against his will, the person . . . accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society." Wyo. Stat. § 6-2-402(a).

100. Under Wyoming State law, the crime of blackmail/extortion is a "felony punishable by imprisonment for not more than ten (10) years." Wyo. Stat. §6-2-402(b).

101. The High Island Ranch is a guest ranch which draws customers from both inside and outside of the State of Wyoming.

102. The High Island Ranch and the BLM engage in interstate commerce.

103. The BLM forfeited the easement that George Nelson granted to it on or about April 5, 1994 by failing to record it before Plaintiff Robbins purchased the High Island Ranch and recorded his title.

104. The failure to record that easement prior to Plaintiff Robbins' purchase means Defendants had no legal right to an easement across Mr. Robbins' private property.

105. Defendants had no legal right to demand that Plaintiff Robbins grant the BLM an easement

across his private property in return for access to his private property.

106. The BLM had no legal authority to condition approval of the transfer of Plaintiff Robbins' right-of-way on Mr. Robbins' grant of an easement to the BLM.

107. Defendants Wilkie, Barnes, Leone, Shryack, Miller and Wallace each engaged in a conspiracy to commit and/or committed two or more acts of attempted extortion under color of official right, attempted extortion by the wrongful use of fear under 18 U.S.C. 1951, and/or extortion under Wyo. Stat. § 6-2-402; and an abuse of executive discretion. Specifically, the Defendants committed the acts set forth in the partial list below, each of which interfered with Plaintiff Robbins' guest ranch and livestock business which engages in interstate commerce:

    a. The Defendants refused to maintain the road necessary for Plaintiff Robbins' to access his private property in effort to coerce Mr. Robbins to grant the BLM an easement across his private property. This constituted extortion under color of official right and by wrongful use of fear of economic harm.

    b. On numerous occasions, Defendants Barnes, and Wilkie illegally threatened to cancel a right-of-way that Plaintiff Robbins acquired with his purchase of the Ranch unless Plaintiff Robbins granted the BLM an easement.

    c. Coupled with the Defendants' refusal to keep the subject road passable, these threats were

threats to deny Plaintiff Robbins access to his private property.

d. These threats were made for the purpose of causing Plaintiff Robbins to fear economic loss to his guest ranch business and to let Plaintiff Robbins know that the Defendants would cause financial harm if he did not grant the BLM an easement.

e. Each threat to cancel or deny Plaintiff Robbins his right-of-way was an attempt to extort an easement from Plaintiff Robbins through the wrongful use of fear and under color of official right. The threats occurred on at least the following occasions:

   i. In June, 1994, Mr. Vessels threatened to terminate the right-of-way across public lands that Plaintiff Robbins acquired with his purchase of the Ranch unless he granted the BLM an easement. During this conversation, Mr. Vessels told Plaintiff Robbins that he had to give the BLM an easement, one way or another, and that he had no choice.

   ii. On or about February 23, 1995, Mr. Vessels stated that he was going to condition Plaintiff Robbins' continued use of the right-of-way on Plaintiff Robbins' grant of an easement to the BLM.

   iii. On or about April 20, 1995, Defendant Wilkie wrote to Plaintiff Robbins and threatened not to approve George Nel-

son's assignment of the right-of-way to Plaintiff Robbins unless Plaintiff Robbins granted the BLM an easement. Defendant Wilkie further threatened to cancel the right-of-way and deny all but "casual" access to Plaintiff Robbins' property if he refused to gant the easement.

iv. On or about June 6, 1996, Defendant Wilkie wrote to Plaintiff Robbins and threatened to cancel the right-of-way unless Plaintiff Robbins granted the BLM an easement across his private property.

f. On or about July 21, 1995, Defendant Wilkie actually cancelled Plaintiff Robbins' right-of-way in order to coerce him to grant the BLM an easement. This act constituted attempted extortion under color of official right.

g. In or around the summer of 1994, Mr. Vessels demanded permission to survey for an easement on Plaintiff Robbins' private property. Plaintiff Robbins stated that he was not going to grant the easement and denied permission for the trespass and survey. To demonstrate that he could force Plaintiff Robbins to grant the BLM an easement one way or another, and to intimidate Plaintiff Robbins into granting the easement, Mr. Vessels trespassed, or caused others to trespass and conduct the survey on Plaintiff Robbins' property. This

act was an attempt to extort under color of office.

h. Because Plaintiff Robbins refused to grant the BLM an easement, Defendant Leone stated to fellow BLM employees that he was going to "bury Frank Robbins."

i. In or around May, 1996, Ed Parodi, at the time a BLM employee, was sent by Mr. Vessels to Plaintiff Robbins' house to tell him to start doing what BLM employees wanted or that Plaintiff Robbins would suffer retribution.

j. At the May, 1996 meeting, Ed Parodi reported Defendant Leone's statement, that he was going to "bury Frank Robbins," to Plaintiff Robbins.

k. At the May, 1996 meeting, Mr. Parodi admitted that the BLM was causing Plaintiff Robbins trouble because he had refused to give the BLM an easement.

l. The Defendants began improperly trying to cause and/or conspiring to cause disputes between Mr. Robbins and his neighbors in an effort to coerce him to grant the BLM an easement. Specifically, on or about August 31, 1995, Defendant Leone provoked Mrs. Pennoyer into a vehicular battery against Plaintiff Robbins to show Plaintiff Robbins that the Defendants were going to "bury" him if he did not give the BLM an easement. This act was an attempt to extort under color of office.

m. On or about August 31,1995, Defendant Leone contacted Mr. Pennoyer and encouraged him to file a written complaint against Plaintiff Robbins with the BLM to show Plaintiff Robbins that the BLM employees were going to "bury" him if he did not give the BLM an easement. Defendant Leone had also engaged in similar conduct on at least one prior occasion. These acts were an attempt to extort under color of office and an attempt to extort by the wrongful use of fear.

n. On or about August 31, 1995, Defendant Leone contacted Mr. Pennoyer and encouraged him to contact the sheriff and file a criminal action against Plaintiff Robbins to show Plaintiff Robbins that the BLM employees were going to "bury" him if he did not give the BLM an easement. This act was an attempt to extort under color of office and an attempt to extort by the wrongful use of fear. This action also constituted an abuse of process by Defendant Leone because he was trying to cause a criminal prosecution against Plaintiff Robbins for the purpose of coercing Plaintiff Robbins to give the BLM an easement.

o. Following the incident with Mrs. Pennoyer, the Defendants used the incident that Defendant Leone had provoked as an excuse to cancel Plaintiff Robbins' SRUP to further coerce him to give the BLM an easement. This act was an attempt to extort under color of office.

p. On or about July 21, 1997 and on occasions thereafter, the Defendants falsely conspired

to and accused Plaintiff Robbins of a federal crime for the purpose of coercing him to grant the BLM an easement. This was attempted extortion by wrongful use of fear, attempted extortion under color of office, and a violation of Wyoming's extortion statute.

q. On or about July 21, 1997, Defendant Barnes made clear to Plaintiff Robbins that the purpose for the criminal charge was to coerce him to grant the easement when, immediately before subjecting Plaintiff Robbins to the surprise interrogation by Defendant Miller, Defendant Barnes told Plaintiff Robbins that if he would sign the easement all of his troubles would go away. Defendant Barnes' statement was, in and of itself, an act of attempted extortion under color of office.

r. Defendant Wilkie and Mr. Vessels were present when Defendant Barnes made the statement that all of Plaintiff Robbins' troubles would go away if he granted the BLM an easement and they endorsed and thereby conspired with Defendant Barnes to attempt to extort under color of official right and by wrongful use of fear an easement through this statement.

s. On or about July 21, 1997, Defendant Miller threatened to accuse Plaintiff Robbins of criminal actions for the purpose of coercing him to grant the BLM an easement. This act was an attempt to extort under color of office and an attempt to extort by wrongful use of

fear. This act also constituted a violation of Wyo. Stat. § 6-2-302(a).

t. On or about July 31, 1997 and thereafter Defendant Miller accused Plaintiff Robbins of criminal actions for the purpose of coercing him to grant the BLM an easement. The crime the Defendants falsely accused Plaintiff Robbins of committing, forcibly interfering with a federal officer: was punishable by imprisonment and fines up to $100,000 and tended to degrade and disgrace Plaintiff Robbins and subjected him to the ridicule and contempt of society. This act was an attempt to extort under color of office an attempt to extort by the wrongful use of fear. This act also constituted a violation of Wyo. Stat. § 6-2-402(a).

u. Defendants Barnes, Wilkie, and Shryack conceived of a plan and conspired with each other and Defendant Miller and did threaten to accuse Plaintiff Robbins of a criminal violation for the purpose of coercing him to grant the BLM an easement. These acts were an attempt to extort under color of office and an attempt to extort by the wrongful use of fear. These acts also constituted a violation of Wyo. Stat. § 6-2-402(a).

v. Defendants Barnes, Wilkie, and Shryack conceived of a plan, and conspired with each other and Defendant Miller to, and did falsely accuse Plaintiff Robbins of a criminal violation for the purpose of coercing him to grant the BLM an easement.

w. Defendants Barnes, Wilkie, and Shryack conceived of the plan, and conspired with each other and Defendant Miller to, and caused Plaintiff Robbins to be prosecuted for a criminal violation without probable cause for the purpose of coercing him to grant the BLM an easement. These acts were attempts to extort under color of office and an attempt to extort by the wrongful use of fear. These acts also constituted violations of Wyo. Stat. § 6-2-402(a).

x. Defendants Barnes, Wilkie, Shryack and Miller caused, and conspired with each other to cause frivolous criminal charges to be filed against Plaintiff Robbins on or about August 15, 1997 in order to coerce him to grant the BLM an easement. This constituted attempted extortion by wrongful use of fear, attempted extortion under color of office, and a violation of Wyo. Stat. § 6-2-402(a).

y. Defendants attempted to coerce Plaintiff Robbins to grant the BLM an easement by interfering with Plaintiff Robbins' guest ranch operation.

    i. Specifically, Defendants Leone, Barnes, Shryack and Miller began intimidating Plaintiff Robbins' guests by following the guest cattle drives in a BLM vehicle. These actions were calculated to cause Plaintiff Robbins to fear economic loss and to adversely affect his business. These acts were attempts to extort under

color of office and attempts to extort by wrongful use of fear.

ii. The Defendants, including Defendant Shryack, attempted to coerce Plaintiff Robbins to grant the BLM an easement through intimidation by trespassing on his private property, causing resource damage and interfering with his guest ranch operations to force Plaintiff Robbins to grant the BLM easement. These acts were attempts to extort under color of office, and attempts to extort by the wrongful use of fear.

z. On a number of occasions. the Defendants, including Defendants Barnes, Shryack and Miller, actually trespassed on Plaintiff Robbins' private property in order to look for evidence that might support grazing trespass citations against Plaintiff Robbins. These trespasses were part of Defendants' scheme and conspiracy to "bury" Plaintiff Robbins until he granted the BLM an easement. These acts were attempts to extort under color of office and by the wrongful use of fear.

aa. The Defendants instigated a pattern of disparate enforcement of trespass regulations against Plaintiff Robbins in an effort to convince Plaintiff Robbins that they would "bury him" if he did not grant the BLM the easement. The Defendants accused Plaintiff Robbins of trespass no less than eight times between April 18, 1996 and July 3, 1996, and have made similar allegations numerous times

since then. These acts were attempts to extort under color of office.

bb. The Defendants have continued its pattern of disparate enforcement of trespass regulations for the purpose of coercing Plaintiff Robbins to gant the BLM an easement. These acts were attempts to extort under color of office.

cc. The Defendants falsely accused Plaintiff Robbins of trespass on at least two occasions for the purpose of coercing him to gant the BLM an easement.

i. On or about November 19, 1996, the BLM falsely accused Plaintiff Robbins of trespass. The BLM later withdrew this accusation.

ii. Mr. Vessels and Defendant Wilkie falsely charged Plaintiff Robbins with trespass when his livestock were on his private ground on four separate occasions between November 18, 1997 and November 24, 1997. During these times, the BLM had no evidence that the livestock had been trespassing on BLM lands. This was an attempt to extort under color of office.

dd. On or about November 6, 1995, the BLM employees revoked Plaintiff Robbins' SRUP to force Plaintiff Robbins to give the BLM an easement. This action was an attempt to extort under color of official right.

ee. On or about July 21, 1995, the BLM employees, specifically Mr. Vessels and Defendants

Wilkie and Barnes, illegally denied and threatened to continue denying Plaintiff Robbins' reasonable access to his private property for the purpose of forcing him to give the BLM an easement.

ff. As a part of their ongoing effort to force Plaintiff Robbins to grant the BLM an easement by denying him reasonable access to his private property, the Defendants filed a trespass action against Plaintiff Robbins alleging that he had repaired a road that was crucial for access to his private property. This constituted attempted extortion under color of official right.

gg. As a part of their ongoing effort to force Plaintiff Robbins to grant the BLM an easement by denying him reasonable access to his private property, Defendant Barnes cancelled Frank Robbins' SRUP, and livestock permit which represents his guest ranch and livestock activities.

hh. As part of their ongoing effort to force Plaintiff Robbins to grant the BLM an easement and to punish Plaintiff Robbins for failing to capitulate to their demands, Defendants Barnes, Shryack, Wallace, and Wilkie used the aforementioned frivolous allegations and decisions to take away Plaintiff Robbins' grazing privileges for the High Island, HD and Owl Creek ranches.

ii. As part of their ongoing effort to force Plaintiff Robbins to grant the BLM an easement and to punish Plaintiff Robbins for failing to

capitulate to their demands, Defendants Barnes, Shryack, Wallace, Leone and Wilkie have attempted to have Plaintiff Robbins' settlement agreement revoked by bringing false accusations before the Department of the Interior, soliciting the help of various environmental anti-grazing organizations, and by publishing false statements to the press.

108. The foregoing acts demonstrate an ongoing abuse of executive discretion. Defendants Wilkie, Barnes, Leone: Shack, Miller and Wallace attempted to obtain an easement across Plaintiff Robbins' private property, to which the BLM was not entitled, through numerous acts of attempted extortion under color of official right, attempted extortion by the wrongful use of fear, and extortion as prohibited by Wyo. Stat. § 6-2-402(a).

109. These extortionate acts were related in purpose, methods and participants.

110. The extortionate acts continued over a period of years following Plaintiff Robbins' acquisition of the High Island Ranch in 1994 and continue to this day.

111. The Defendants each conspired to commit and committed two or more acts of attempted extortion under color of official right, attempted extortion by the wrongful use of force, and extortion as prohibited by Wyoming law, that were related in purpose, method, and participants and which continued over a period of years. This constitutes a pattern of racketeering activity, and an abuse of executive discretion.

112. Defendants Barnes and Wilkie and Mr. Vessels implicitly threatened that Plaintiff Robbins' "troubles" with the BLM would not go away until he granted the BLM an easement.

113. Defendant Leone's threat that he was going to "bury Frank Robbins" demonstrates that the Defendants do not intend to cease their assault on Plaintiff Robbins. Thus, there is a clear threat that the pattern of racketeering activity will continue.

114. All of the above actions were taken as part of an ongoing scheme to coerce Plaintiff Robbins to grant the BLM an easement, to which it had no right.

115. An easement is an ownership interest in real property.

116. Defendants engaged in numerous acts to obtain an easement across the High Island Ranch's private property under color of official office. Each act constituted an act of extortion and, consequently, a "racketeering activity."

117. Defendants Wilkie, Barnes, Leone, Shryack, Miller and Wallace were employed by and participated in the activities of the BLM.

118. The United States Bureau of Land Management is an enterprise within the meaning of the Racketeering Influenced and corrupt Organizations statute.

119. Defendants Wilkie, Barnes, Leone, Shryack, Miller and Wallace were otherwise associated and constituted an enterprise within the meaning of 18 U.S.C. § 1962(c).

120. Each Defendant conspired to, and conducted and participated, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activities as described above.

121. Defendants' conduct directly and proximately caused Plaintiff Robbins and his family grievous economic and emotional injury, fear of economic harm, and was the direct and proximate cause of severe injury to Plaintiff Robbins' personal and business reputation.

122. Defendants' conduct directly and proximately interfered with the High Island Ranch's guest ranching and cattle business which engages in interstate commerce.

123. Defendants' effort to punish, coerce and to force Plaintiff Robbins to capitulate to their demands continues.

124. Specifically, during the summer of 1999, Plaintiff Robbins approached Mr. Baker who was videotaping Plaintiff Robbins and his guests.

125. Mr. Baker is a BLM official under the Defendants' authority and control.

126. Plaintiff Robbins and Mr. Baker engaged in a conversation regarding the past abuses by the BLM against Plaintiff Robbins.

127. Baker accused Plaintiff Robbins of violating some law but refused to identify what Plaintiff Robbins was doing wrong.

128. Mr. Baker stated that it would be nice if the BLM had public access through Plaintiff Robbins' private lands. This demonstrates that the Defendants

have made it clear to new members of their staff that public access across Plaintiff Robbins' private lands is vitally important to their efforts to force Plaintiff Robbins to capitulate to their demands. This admission demonstrates an ongoing pattern of racketeering, extortion and abuse of executive discretion.

129. The Defendants' actions have caused Plaintiff Robbins to fear retribution and the loss of his livelihood if he exercises his private property rights. This demonstrates a pattern of "racketeering," intimidation and abuse of executive discretion.

130. Defendants' conduct was in willful disregard for Plaintiff Robbins' property rights and has directly caused damages within the jurisdictional limits of this Court in an amount to be further proved at trial. Defendants' conduct justifies an award of treble damages, punitive damages and attorneys' fees and costs.

***Count Two: Violation of Civil Rights under Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)***

131. Plaintiff realleges each and every allegation of paragraphs 1 through 130 above, and specifically incorporates the same as if fully set forth, and for a cause of action against the Defendants, alleges as follows:

132. The Fifth Amendment to the Constitution "protects the right to exclude others from private property." *Robbins v. BLM*, 252 F.Supp.2d 1286, 1301 (D.WY 2003).

133. An "act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983, and hence in a *Bivens* action." *Id.*

134. Plaintiff Robbins exercised his constitutional right to exclude others from his private property when he refused to grant the Defendants an easement for nothing, and refused to allow the Defendants *carte blanche* authority to access his private property.

135. The Defendants have engaged in multiple acts, under color of authority, designed to threaten, harm: extort and punish Plaintiff Robbins for failing to grant the Defendants an easement, failing to grant the Defendants access to his private property, and failing to capitulate to the Defendants' demands. These acts were committed by the Defendants with the intent, not only to extort Plaintiff Robbins, but also to punish and retaliate against Plaintiff Robbins for exercising his private property rights. In so doing, the Defendants violated Plaintiff Robbins' right to exercise his constitutional property rights free from retaliation therefrom.

136. Defendants' conduct was the direct and proximate cause of grievous economic and emotional injury to Plaintiff Robbins and was the direct and proximate cause of injury to Plaintiff Robbins' personal and business reputation.

137. As a result of Defendants' conduct described above, Plaintiff Robbins has sustained damages in an amount to be proven more specifically at trial.

## V. DAMAGES

138. Plaintiff realleges each and every allegation of paragraphs 1 through 137 above, and incorporates the same as if fully set forth, and for a cause of action against the Defendants, alleges as follows:

139. As a direct and proximate result of the Defendants' aforementioned conduct, and any other negligence, intentional misconduct, or violations of applicable statutes, codes, regulations or ordinances which may be brought out at trial, Plaintiff Robbins has sustained damages which have resulted in or may result in:

a. Economic losses and property damages;

b. Lost time;

c. Injury to personal and business reputation;

d. Emotional harm; and

e. Other damages to be demonstrated at trial.

**PRAYER FOR RELIEF**

WHEREFORE, based on the foregoing, Plaintiff Robbins prays for judgment against the Defendants as follows:

A. Declaratory judgment that the Fence Easement provides Defendants only the limited right to use the Rock Creek Road for the specific purpose of repair and maintenance of the 276 feet of fencing described in said easement;

B. Declaratory judgment that the Defendants have no right to enter onto the Plaintiff Robbins' private property other than that provided by the Fence Easement;

C. Declaratory judgment that the Fence Easement terminated by virtue of the Defendants' misuse thereof.

D. Declaratory judgment that the alleged ability of Plaintiff Robbins' livestock to access BLM property, without actual evidence of trespass, is insufficient to permit the BLM to presume that Plaintiff Robbins' livestock have trespassed on BLM land;

E. Injunctive relief prohibiting Defendants from instigating further trespass actions against Plaintiff Robbins when they have no evidence that Plaintiff Robbins' livestock have actually entered onto BLM lands where they are not permitted;

F. Compensatory damages in an amount to be more specifically demonstrated at trial;

G. Damages for emotional distress;

H. Treble damages pursuant to 18 U.S.C. § 1964 (c);

I. Costs of suit herein incurred;

J. Actual attorneys' fees;

K. Prejudgment interest;

L. Punitive damages;

M. Such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED ths 3rd day of November, 2003.

/s/ KAREN BUDD-FALEN
KAREN BUDD-FALEN
MARC R. STIMPERT
RICHARD B. AUBUCHON
BUDD-FALEN LAW OFFICES, P.C.
300 East 18th Street
Post Office Box 346
Cheyenne, Wyoming 82003-0346
(307) 632-5105 Telephone
(307) 637-3891 Telecopier

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing to be deposited in the U.S. Mail this 3rd day of November, 2003 to the following:

Thomas D. Roberts
2120 Capitol Avenue, Room 4002
Post Office Box 668
Cheyenne, WY 82003

/s/ KEARN HULL
KEARN HULL

[WYW-12787
RE-WI-214
(016)]

[20 APR 1995]

CERTIFIED MAIL NUMBER P 008 868 798
RETURN RECEIPT REQUESTED

H. Frank Robbins, Jr.
Route 5, Box 101B
Tuscumbia, AL 35674

Dear Mr. Robbins:

On February 23, 1995, Joe Vessels discussed with you the assignment of road right-of-way WYW-127878 from High Island Ranch and Cattle Company to you as the current owner of the property accessed by the road. This assignment is necessary if you intend to maintain the road or use it for other than casual use. I have enclosed a copy of the right-of-way grant for your reference.

As Mr. Vessels also discussed with you, a condition of the right-of-way is the reciprocal grant of a non-exclusive easement to the United States for administrative access across your deeded lands in the Rock Creek area. This easement was originally signed by the previous landowner shortly before you acquired the property and was not recorded with Hot Springs County in time for you to be aware of it upon purchase. In order to ensure an easement that can be properly recorded with the county, we need to have the current owners of record sign the easement. I have enclosed the easement

document for you and the other owners to sign. Please note that each signature must be witnessed by a notary public and the notary's certification must acknowledge that.

Please return the signed easement document to this office within thirty (30) days of receipt of this letter. Please also provide the name(s) that you would like the right-of-way assignment in. The normal right-of-way assignment fee will be waived because of the reciprocal easement requirement. If you do not respond to this request, we will assume that you are not interested in having the right-of-way assigned to you and will proceed with canceling the right-of-way grant.

The annual rental on this right-of-way is adjusted to compensate the holder for the relative value of the reciprocal non-exclusive easement. The 1995 rent of $246.00 is now due. Please submit this payment with the above requested easement and other information.

If you have any questions, please contact Steve Till or Joe Vessels at (307) 347-9871.

Sincerely,

/s/ CHARLES F. WILKIE
CHARLES F. WILKIE
Bighorn Basin Area Manager

Enclosures

cc: High Island Ranch
P.O. Box 71B
Hamilton Dome, WY 82427

BBRA: JVessels:4/19/95:G\VESSELS\ROBBINS2.LET

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

NONEXCLUSIVE ROAD EASEMENT

Tract No.
RE-W1-214

For the sum of $ 1.00 and the grant by the United States of R/W No. WYW-127878

H. Frank Robbins, Jr., Karen P. Robbins, Holli Ann Robbins, and Harvey Frank Rollins, III,

herein after called Grantor, whether one or more, does grant to the UNITED STATES OF AMERICA, and its assigns, a nonexclusive easement to use, maintain, improve, and repair an existing road located on the following-described real property situated in the County of Hot Springs, State of Wyoming, to wit:

Sixth Principal Meridian;
T.43N., R. 102W.,

| | | |
|---|---|---|
| Sec | 5 | W½SW¼, SE¼SW¼; |
| | 6 | W½NE¼, NE¼SE¼ |
| | 8 | Ne¼NW¼W¼NE¼, |
| | 9 | SW¼, SW¼ |
| | 17 | Lot 4; |
| | 21 | Lots 1, 2 and 3, SW¼NE¼ |

T.44N., R. 102W.,

| | | |
|---|---|---|
| Sec | 31 | NW¼NW¼, SE¼, NW¼ |

the said parcel being all that portion of said property contained within a strip of land 30 feet in width being 15 feet on each side of the centerline; which road is more particularly shown on Exhibit A which is attached

hereto and made a part hereof. The parcel of land to which the above description applies contains 15.58 acres, more or less.

When the authorized officer of the Bureau of Land Management determines that the road above described might be used for the sale of resources from public lands, the contract for such resource will provide that if the purchaser shall use the road he shall do no subject to the following provisions.

1. Avoid vehicle use when wet conditions would cause road damage
2. Maintain the road if damage results from use authorized by the Bureau of Land Management.

The easement herein granted is for the full use as a road by THE UNITED STATES OF AMERICA, and its licensees, and is subject to the effect of reservations and leases, if any, of oil, gas, and minerals in and under said land; provided, that any use of the roadway for oil and/or gas activities shall be subject to permission from the Grantor.

TO HAVE AND TO HOLD said easement unto the UNITED STATES OF AMERICA, and its assigns, for a term commencing on the date shown below and continuing until March 31, 2014.

Grantor covenants and warrants that he is lawfully seized and possessed of the land aforesaid and has the full right, power and authority to execute this conveyance, and that said land is free and clear of liens, claims or encumbrances, except as shown above, and that he will defend the title to the easement conveyed herein and quiet enjoyment thereof against the lawful claims and demands of all persons.

Accepted subject to approval of title by the Department of Justice:

Dated this Day of , 19

_____

(Signature of Authorize Officer)

District Manager

(Title)

(PDF Map Goes Here)

[PLAINTIFF'S EXHIBIT 17]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

NONEXCLUSIVE ROAD EASEMENT

Tract No.
RE-W1-214

For the sum of $ 1.00 and the grant by the United States of R/W No. WYW-127878

High Island Ranch and Cattle Co., a Wyoming Corporation,

herein after called Grantor, whether one or more, does grant to the UNITED STATES OF AMERICA, and its assigns, a nonexclusive easement to use, maintain, improve, and repair an existing road located on the following-described real property situated in the County of Hot Springs, State of Wyoming, to wit:

| | | |
|---|---|---|
| T.43N., R. 102W. | | |
| Sec | 5 | W¼SW¼, SE¼SW¼; |
| | 6 | W¼ NE¼, NE¼ SE¼ |
| | 8 | NE¼ NW¼ W¼ NE¼, E¼ SE¼, NW¼,SE¼ |
| | 9 | SW¼, SW¼ |
| | 17 | Lot 4; |
| | 21 | Lots 1, 2 and 3, SW¼ NE¼ |
| T.44N., R. 102W. | | |
| Sec | 31 | NW¼ NW¼, SE¼, NW¼ |

Sixth Principal Meridian;

the said parcel being all that portion of said property contained within a strip of land 30 feet in width being 15 feet on each side of the centerline; which road is more particularly shown on Exhibit A which is attached hereto and made a part hereof. The parcel of land to which the above description applies contains 15.58 acres, more or less.

When the authorized officer of the Bureau of Land Management determines that the road above described might be used for the sale of resources from public lands, the contract for such resource will provide that if the purchaser shall use the road he shall do no subject to the following provisions.

1. Avoid vehicle use when wet conditions would cause road damage
2. Maintain the road if damage results from use authorized by the Bureau of Land Management.

The easement herein granted is for the full use as a road by THE UNITED STATES OF AMERICA, and its licensees, and is subject to the effect of reservations and leases, if any, of oil, gas, and minerals in and under said land; provided, that any use of the roadway for oil and/or gas activities shall be subject to permission from the Grantor.

TO HAVE AND TO HOLD said easement unto the UNITED STATES OF AMERICA, and its assigns, for a term commencing on the date shown below and continuing until March 31, 2014.

Grantor covenants and warrants that he is lawfully seized and possessed of the land aforesaid and has the full right, power and authority to execute this conveyance, and that said land is free and clear of liens, claims or encumbrances, except as shown above, and that he will defend the title to the easement conveyed herein and quiet enjoyment thereof against the lawful claims and demands of all persons.

Accepted subject to approval of title by the Department of Justice:

Dated this 18th Day of March, 1994

[ILLEGIBLE]
(Signature of Authorize Officer)

District Manager
(Title)

[ILLEGIBLE]

_____

_____

CORPORATE ACKNOWLEDGMENT

STATE OF Massachusetts)
) ss:
COUNTY OF Esseex )

On this 18th day of March, 1994, before me personally appeared George H. Nelson, Jr. and to be the owner, President of the corporation that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated he authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above-written.

[SEAL]

[ILLEGIBLE]
Notary Public in and for the
State of Massachusetts
Reading at Danvers, Ma

My commission expires: July 21, 2000

[PLAINTIFF'S EXHIBIT 19]

[WYW-127878 (016)]

[APR 06 1994]

CERTIFIED MAIL NUMBER P.046 890 535
RETURN RECEIPT REQUESTED

**DECISION**

High Island Ranch and Cattle Co.
P.O. Box 71B
Hamilton Dome, WY 82427

Right-of-Way Grant WYW 127878 Issued
Rental Determined

Enclosed is a copy of a right-a-way (R/W) grant (serial number WYW-127878) for the construction, operation, maintenance and termination of an access road which has been approved by the Bureau of Land Management. The rental for linear R/W is determined according to regulations found at 43 CFR 2803. 1-2. The rental for the above-referenced R/W is $182.00 for a one year term through December 31, 1994, adjusted for calendar year billing. The rental rate has been reduced to 71 percent of the current fair market value rental rate to compensate you for the relative value of the reciprocal nonexclusive easement. The processing fees have been credited toward the rental and the balance of $118.00 has been refunded to you. You should receive the refund in four to six weeks. We will provide you with a copy of the reciprocal nonexclusive easement docu-

ment after we have it recorded with Hot Springs County.

All subsequent rental payments will be due at the beginning of the calendar year and thereafter in one year increments. Future billings will reflect the latest adjusted schedule as published in the Federal Register, and the 71 percent reduction for the reciprocal non-exclusive easement.

The issuance of this R/W grant constitutes a final decision by the Bureau of Land Management in this matter.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from this error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21 (58 FR 4939, January 19, 1993) or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, You have the

burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show a sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied;

(2) The likelihood of The appellant's success on The merits,

(3) The likelihood of immediate and irreplaceable harm if The stay is not granted, and

(4) Whether The public interest favors granting the stay.

If you have any questions, please contact me at The above address or telephone (307) 347-9871.

Sincerely,

/S/ JOSEPH VESSELS
JOSEPH T. VESSELS
Grass Creek Area Manager

Enclosures:

Form 2800-14
Form 1842-1

FORM 2800-14
(August 1985)

Issuing Office
Grass Creek Resource Area

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY GRANT/TEMPORARY USE PERMIT

SERIAL NUMBER WYW-127878

---

1. A right-of-way is hereby granted pursuant to Title V of the Federal Land Policy and Management Act of October 21, 1976, (90 Stat. 2776; 43 U.S.C. 1761).

2. Nature of Interest:
   a. By this instrument, the holder:

      High Island Ranch and Cattle Co.
      P.O. Box 71B
      Hamilton Dome, Wyoming 82427

receives the right to construct, operate, maintain, and terminate an access road, on public lands described as follows:

6th Principal Meridian, Wyoming

| | | |
|---|---|---|
| T.43N., R.100W, Section | 17 | S½, SW¼SE¼; |
| | 18 | Lot 3, E½SW¼, S¼SE¼; |
| | 20 | N½NE¼; |
| | 21 | S½NE¼, N½NW¼; NE¼SE¼; |
| | 22 | N½SW¼,N½SE¼ |

| | | |
|---|---|---|
| T.43N., R.101W.,Section | 13 | S½NE¼, SW¼NW¼, N½SW¼, NW¼SE¼; |
| | 14 | S½NE1¼, NW¼NW¼, S½NW¼; |
| | 15 | NE¼; S½NW¼, W½SW¼; |
| | 20 | NE¼SE¼, S½SE¼; |
| | 21 | NE¼NE¼, S½NE¼, SE¼NW¼, N½SW¼; |
| | 22 | NW¼NW¼; |
| | 29 | W½NE¼, N½SW¼, SW¼SW¼, NW¼SE¼; |
| | 30 | Lots 6, 7 and 13; |
| T.43N., R.102W., Section | 21 | N½NE¼, SE¼NE¼; |
| | 22 | NE¼NW¼, SW¼NW¼; |
| | 23 | SE¼SE¼; |
| | 25 | SW¼NE¼, W½NW¼, SE¼NW¼; |
| | 26 | NE¼NE¼, NW¼NW¼. |

b. The right-of-way or permit area granted herein in 30 feet wide, 76,930 feet long and contains 53 acres, more or less.

c. This instrument shall terminate 30 years from it's effective date unless, prior thereto, it is relinquished, abandoned, terminated, or modified pursuant to the terms and conditions of this instrument or of any applicable Federal Law regulation.

d. This instrument may be renewed. If renewed, the right-of-way or permit shall be subject to the regulations existing at the time of renewal and any other terms and conditions that the authorized officer deems necessary to protect the public interest.

e. Notwithstanding the expiration of this instrument or any renewal thereof, early relinquishment, abandonment, or termination, the provisions of this instrument, to the extent applicable, shall continue in effect and shall be binding by the holder, its successors, or assigns, until they have fully satisfied the obligations and/or liabilities accruing herein before or on account of the expiration, or prior termination, of the grant.

3. Rental:

For and in partial consideration of the rights herein granted the holder agrees to grant Nonexclusive Road Easement No. RE -W1-214 to the United States. Said easement to be executed by the grantor prior to approval of this right-of-way grant by the BLM authorized officer.

For and in consideration of the remainder of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, wherever necessary, to reflect changes in the fair market rental value as

determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices.

4. Terms and Conditions:

   a. This grant or permit is issued subject to the holder's compliance with all applicable regulations contained in Title 43 Code of Federal Regulations part 2800.

   b. Upon grant termination by the authorized officer, all improvements shall be removed from the public lands within 90 days, or otherwise disposed of as provided in paragraph (4) (d) or as directed by thee authorized officer.

   c. Each grant issued for a term of 20 years or more shall, at a minimum, be reviewed by the authorized officer at the end of the 20th year and at regular intervals thereafter not to exceed 10 years. Provided, however, that a right-of-way or permit granted herein may be reviewed at any time deemed necessary by the authorized officer.

   d. The stipulations, plans, maps, or designs set forth in Exhibit A, attached hereto, are incorporated into and made a part of this grant instrument as fully and effectively as if they were set for th herein in their entirety.

   e. Failure of the holder to comply with applicable law or any provision of this right-of-way grant or permit shall constitute grounds for suspension or termination thereof.

f. The holder shall perform all operations in a good and workmanlike manner so as to ensure protection of the environment and the health and safety of the public.

g. Any cultural and/or paleontological resource (historic or prehistoric site or object) discovered by the holder, or any person working on his behalf, on public or Federal land shall be immediately reported to the authorized officer. Holder shall suspend all operation in the immediate area of such discovery will be made by the authorized to proceed is issued by the authorized officer to determine appropriate actions to prevent the loss of significant cultural or scientific values. will be made by the authorized officer to determine appropriate actions to prevent the loss of significant cultural or scientific values. The holder will be responsible for the cost of evaluation and any decision as to proper mitigation measures will be made by the authorized officer after consulting with the holder.

h. No construction or routine maintenance activities shall be performed during periods when the soil is too wet to adequately support construction equipment. If such equipment creates ruts in excess of two (2) inches deep the soil shall be deemed too wet to adequately support construction equipment.

i. Construction and maintenance activities, surface disturbance, and other commercial traffic will be prohibited during the period from November 1 to June 15, each year, for the protection of

wildlife habitat values. Any exceptions to this requirement must have prior written approval from the authorized officer.

j. The holder shall conduct all activities associated with the construction, operation, maintenance, and termination of the right-of-way within the authorized limits of the right-of-way.

k. The holder shall seed all disturbed areas, using a method and seed mixture suitable for the location, as directed by the authorized officer. Seeding shall be repeated if a satisfactory stand is not obtained as determined by the authorizing officer upon evaluation after the third growing season.

l. If snow removal from the road is undertaken, equipment used for snow removal operations shall be equipped with shoes to keep the blade two (2) inches off the road surface. Holder shall take special precautions where the surface of the ground is uneven and at drainage crossings to ensure that equipment blades do not destroy vegetation.

m. Holder shall maintain the right-of-way in a safe, usable condition, as directed by the authorized officer. A regular maintenance program shall include, but is not limited to, blading, ditching, culvert installation and cleaning, cattleguard cleaning, and surfacing.

n. Use of this right-of-way for oil, gas, and/or other mineral exploration, development or production is not permitted under this authorization.

IN WITNESS THEREOF, The undersigned agrees to the terms and conditions of this right-of-way grant to permit.

| | |
|---|---|
| [Illegible] | [Illegible] |
| (Signature of Holders) | (Signature of Authorized Officer |
| [President] | [Area Manager] |
| (Title) | (Title) |
| [3/18/94] | [Apr. 5, 1994] |
| (Date) | (Effective Date of Grant) |

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

No. 04-8016

HARVEY FRANK ROBBINS, PLAINTIFF-APPELLEE

*v.*

CHARLES WILKIE, DARRELL BARNES, TERYL SHRYACK, MICAHEL MILLER, GENE LEONE, AND DAVID WALLACE, DEFENDANTS-APPELLANTS

---

On Appeal from the United States District Court
For the District of Wyoming

---

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL APPENDIX**
**VOLUME I**

---

APPEARANCE

Karen Budd-Falen
Marc R. Stimpert
BUDD-FALEN
LAW OFFICES, P.C.
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003
(307) 632-5105 Telephone
(307) 637-3891 Telefax

Attorneys for Plaintiff-
Appellee

[3]

PROCEEDINGS

(Deposition proceedings commenced
7:50 a.m., September 9, 2003.)
(Witness sworn.)
EDWARD LEE PARODI,

called for examination by the Plaintiff, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

Q. (BY MR. FRENCH) Sir, please tell us your name and spell your last name.

A. Edward Lee Parodi, P-a-r-o-d-i.

Q. Mr. Pardoi, how old are you?

A. Fifty-three.

Q. Where were you born?

A. Tacoma, Washington. Actually, Fife, Washington.

Q. Which is close to Tacoma, Washington?

A. Right.

Q. Okay. We're going to be taking your deposition here today so, what will happen is I'll ask some questions.

You answer those questions. If at any time you want to take a break for any reason, please let me know. We'll be glad to accommodate you. You need to answer the questions out loud. Sometimes if you shake your head instead of answering yes or no, we'll ask you just to

answer yes or no because she has to take down a response that we can read [4] later on.

A. Okay.

Q. Before we get started today, let me ask you some questions about your medical status as you sit here today. It's my understanding that you have hepatitis C?

A. Yes, I do

Q. Are you taking any medicines for that hepatitis C?

A. Yeah, I 'm currently in month six of peginterferon treatment and ribavirin, which is a companion drug to the interferon to combat the virus.

Q. Are you taking any other medicines right now?

A. Are you talking about today or are you talking about—

Q. Today, yes.

A. Today, no. Tylenol. I've taken my ribavirin, which is my companion drug that I have to take during this treatment. The treatments are an injection a week for a year. So other than that this morning, no. Those three, my vitamin and a stomach pill because it's in knots.

Q. Are there any other medications that you typically take?

A. Yes, I do take Percocet for pain an discomfort from that treatment plus other disabilities for obvious reasons, and I take a sleeping aid in the evenings and [5] that's a combination of two drugs and it's called

trazodone/flurazepam, and I usually don't take full doses because it doesn't require a full does for me to get a couple hours sleep. Because of the treatment, it wouldn't matter if I took four or ten, I would still only get two three hours of sleep a night. That's a side effect of the interferon.

Q. But you haven't taken the Percocet or the other today?

A. No. As a matter of fact, I don't have any one hand because the VA in their infinite wisdom—we spoke about that. But no I'm not.

Q. And you didn't take a sleeping aid last night?

A. (Witness shakes head.)

Q. Tell me about your mind. Is your mind clear today?

A. My mind is very clear this morning. With the interferon treatment, I must admit that there are times when I sometimes kind of get emotional and it's a short thing. It comes and it goes. It's like a wave and because of the treatment, you never really know when that's going to happen or what will trigger it. So I'm just saying that some time I may get emotional for a second, and if I ask for a break, please allow me that time to regroup.

Q. Absolutely.

[6]

A. That's all I'm asking.

Q. Absolutely. And I don't mean to be rude. I assume if you get emotional we'll be able to tell, tears or something else?

A. Yeah. And it's not instability as much as it is a side effect of the peginterferon after—I've been doing this for six and a half months and now I'm totally saturated. I've lost 40 pounds in six months and the sleep thing, but it's all part of the treatment.

Q. Do you have any problem expressing your thoughts today?

A. No.

Q. Any problem remembering other than as normally happens when you get to be 53 like me and you can't remember like you did when you were 23?

A. Well, unfortunately, I was trying to remember things I wish I could forget.

Q. And we asked today that we start at 8:00 a.m. on Tuesday. Was that to meet your medical schedule?

A. Exactly. I do my treatments on Wednesday mornings as early as I can. That give me pretty much a full day on Wednesday of somewhat mobility and I'm pretty functional. By the end of the day I start getting real sick, and by Thursday and Friday I'm pretty useless, to tell you the truth.

[7]

Q. So is Tuesday early morning the best day in time of the week for you?

A. It is the best time of the day for me mentally, physically and energeywise because it take me five days to get over the treatment and then I'm ready to go again.

Q. Are you having any problem understanding my questions?

A. None whatsoever, sir.

Q. I'd like you to tell me a little bit about your parents. Where are they from?

A. They are both from—well, actually my mother was born in Bismarck, North Dakota. My dad was born, I believe, in Ellis Island.

Q. In New York?

A. In New York, yeah.

Q. He was an immigrant, then?

A. No, he was a citizen, but his parents were immigrants.

Q. Of what extraction?

A. Italian and my mother being Russian-German from North Dakota, of course.

Q. And did you graduate from high school?

A. I graduated from high school while I was in Vietnam. I had a commander that was very smart and sent me to the Air Force and sent me to school and made me get my [8] diploma so I could become a crew chief on a helicopter.

Q. How far did you go in what I call regular school?

A. Eleventh.

Q. Was that in the state of Washington?

A. Yes.

Q. And when did you enlist in the armed forces?

A. 1968.

Q. Where were you stationed when you were in the armed forces?

A. How do you mean stationed?

Q. Where did you serve your tours of duty?

A. I got trained and sent to Vietnam.

Q. How long were you in Vietnam?

A. Twenty and a half months, which is two and a half tours.

Q. I s that the normal amount of tours?

A. Ten months is a normal tour.

Q. Why did you do more than the normal tour?

A. I had a job to do and I had been with the 9th Infantry in late '68 or '69, support combat services, and there were still a lot of work to do and a lot of guys dying. So I decided I'd get in the helicopters where I could help us and still help the cause but more or less help more people, our own people.

Q. Are you a decorated war hero?

[9]

A. Yeah. Yes, sir.

Q. What kind of decorations did you receive?

A. Oh, boy. They are here, but I've received the Bronze Star for heroism in aerial flight. Actually, it says aerial flight. Might say ground combat. I was on the ground when it happened but I jumped out of the helicopter.

I think it's for ground combat. I have an air medal for heroism in aerial combat flight. I have 23 total air medals, which you get for every 25 hours of combat flight, and I have three Army commendation medals. I have three four Vietnam service medals. I have a presidential citation and all the other normal ribbons that you get during your service time.

Q. Were you ever injured in Vietnam?

A. Yes, sir.

Q. Do you have a physical disability from that?

A. A minor physical one. That's why I'm battling my battle with the VA right now because they don't want to compensate me for this disease.

Q. For hepatitis C?

A. Oh no. They will treat me but they won't compensate me, and that's why I gave you that article this morning.

Q. After you got back from Vietnam, that would have been about 1970?

[10]

A. '70, September of 1970 and then I did a year and a half at Fort Leavenworth, Kansas to finish out my tour the Army because I had reenlisted in Vietnam so I could

stay in Vietnam because they were going to rotate me home and I wanted to stay.

Q. And after you got back and got out of the Army

A. Can I back up, Tom?

Q. Yeah.

A. You need to know what I did in Fort Leaven worth, Kansas. I was NCOIC at the burial detail at the national cemetery.

Q. That means what, you assisted in the burial of the—

A. I was a noncommissioned officer in charge of the whole burial detail from receiving the body to getting it in the ground with full military honors.

Q. You did that for how long?

A. Eighteen months.

Q. After you left the Army, that would have been about 19

A. '72.

Q. —72? It's my understanding that at some point you went to work for the National Park Service?

A. 1980.

Q. From 1972 to 1980 what did you do generally?

[11]

A. You name it, I did it.

Q. Various different kinds of jobs?

A. Everything. You know, from ranch work to—I was born and raised on a farm. From ranch work to driving truck to tending bars to, you know, and mostly doing like lot of us other vets for ten or twelve years, being pretty lost.

Q. I understand that there came a time in about 1980 when you went to work for the National Park Service?

A. Yes, sir.

Q. Tell me about that.

A. Luck.

Q. What kind of job did you have?

A. Ordained ordinance. I was sitting in a bar and a guy was listening to me tell war stories and he goes, "Hey, buddy, I'm starting a brand-new crew at Mount Rainier National Park and it's called Helitack and we don't have any experience. You want to go to work for the government? You're a vet." Wow. Back in uniforms.

Q. How long did you work for the Park Service?

A. I think a total of nine and a half years.

Q. Did you spend the whole time at Mount Rainier?

A. No sir.

Q. Where else did you work?

A. Grand Teton National Park, which is what got me [12] in Wyoming.

Q. Did you do the same kind of work in Grand Teton that you did in Mount Rainier?

A. No, as a matter of fact, totally different. I went a whole different direction with my career and I did that partly because of my love for wanting to be in Wyoming. I dreamt about it since I was a kid and that was one thing I know once I got on with the Department of Interior working in the Park Service or BLM or one of the land management agencies that I could transfer around and end up where I wanted to retire and live my life out. So used the government in that respect.

Q. How long did you work for the Park Service total, approximately?

A. Ten years, twelve years.

Q. I think I asked that. I apologize.

A. I would have to look at my records. It might have been less or it might have been more.

Q. It's my understanding that at some point in time you went to work for the BLM, the Bureau of Land Management?

A. Yeah.

Q. And where did you go to work for the BLM?

A. In Cody, Wyoming.

Q. What was your job in Cody?

[13]

A. I was a range technician.

Q. So that would have been about what year, about 1990?

A. '90.

Q. As a range technician, what did you do?

A. Range compliance work for the range program, which all of us understand what that is.

Q. And how long did you work in Cody?

A. There and a half years.

Q. The whole time you were what's called a range technician?

A. Technician.

Q. And the range technician assists on the range with livestock counts and other things like that; is that right?

A.. Assist, no. I had a real good boss up there when he hired me, and no, I was given full rein to do compliance work. I didn't assist in compliance work. I did the compliance work. There's a big difference.

Q. Tell us what compliance work is.

A. I made sure that the permittees followed their AMPs to the best of their ability and kept track of their projects and whatnot and made sure things stayed in line, and when it wasn't, gave them opportunity to take care of it, and if they didn't, then did the trespass thing.

[14]

Q. And what you worked on you transferred to Worland.

A. Yeah.

Q. About what year?

A. 1993.

Q. And when you transferred to Worland, what was your job?

A. Can I take a minute?

Q. Yes.

(Brief recess taken.)

Q. (BY MR. FRENCH) Is your mind clear now?

A. Yeah. It just brought up some stuff.

Q. Okay. And how long did you work for the BLM out of the Worland office?

A. I guess three and a half years.

Q. When did you—did you retire from the Borland office?

A. Yes, sir.

Q. About when was that?

A. '96, I believe.

Q. Do you remember what month it was?

A. No.

Q. Let me give you a frame of reference.

Q. Because I was—social security that time period was—

[15]

Q. Let me give you a frame of reference. Mr. Robbins had a criminal trial in August—excuse me, December of 1997 and you testified at that trial.

A. Yes, sir.

Q. Had you retired before that?

A. Yes, sir.

Q. Was it the same year that you retired that the criminal trial was or do you remember?

A. Hadn't even thought about that. I'm not sure, Tom.

Q. That's fine.

A. Maybe it was late '95, summer of '95 that I retired.

Q. I'm just trying to give a frame of reference.

A. It seems like '96 and I didn't bring my retirement papers with me. I'm sorry.

Q. That's fine. We're not worried about exact dates. We're just trying to help you out a little bit.

A. I know.

Q. Who was in management in the Worland office in 1993 when you started? Who was the top person in that office?

A. Darrell Barnes.

Q. What was his job?

A. Worland district manager.

[16]

Q. Was Mr. Joe Vessels in that office?

A. At the time?

Q. When you started.

A. Whoa, the day I started or when I started because we went through an organizational change and Joe can into the scene shortly after I got there.

Q. Okay. Was Charles Wilkie there at Worland when you started?

A. He was there.

Q. How about Mr.—

A. They were both there in different positions at that time.

Q. What about Mr. Gene Leone?

A. He was there.

Q. And what about Teryl Shryack?

A. Not when I started there, no.

Q. Now I'm going to ask you when you worked at Worland, was your title the same, our job the same as when you worked in Cody?

A. Yes.

Q. And what would be a typical day for you when you worked at the BLM in Worland?

A. A typical day?

Q. Yeah.

A. I'd get up in the morning, be there by 6:30, [17] 7:00, pretty flexible hours because they are on the flex time. Look through my allotment files and I usually had a plan where I was going from day to day to do compliance work. Sign out on the board, get the keys to my vehicle, grab my books, grab my equipment that I need

and hit the field and go to where I said I was going out on the board to my job, you know. That might have been looking at a reservoir over in 15 Mile or looking at a fence line over on the Wood River or, you know, or counting cows up on Carter Mountain.

Q. Did you ever receive any awards from the BLM when you worked in the Worland office?

A. I received a couple on-the-spot cash awards and couple special achievement awards.

Q. Do you remember who was—Mr. Barnes the head guy at that point when you got those awards?

A. Yeah. Yes, sir.

Q. Now I'm going to direct your attention to a time about the time when Frank Robbins purchased the High Island Ranch.

A. Okay.

Q. Do you remember when that was? I'm not asking for a date, but do you remember in your mind about when that was in May 1994?

A. I remember that.

[18]

Q. Before he bought the High Island Ranch, Mr. Robbins bought the High Island Ranch, before that time, was it your understanding that the BLM wanted to purchase the High Island Ranch?

MR. ROBERTS: I'm going to object, it's leading.

Q. (BY MR. FRENCH) Go ahead.

A. What do I do?

Q. That means you can answer. Go ahead, you can answer my question. He made an objection.

A. Fine.

Q. But you can go ahead and anser the question. You want me to repeat the question?

A. Yeah. Yes, sir.

Q. Before Mr. Robbins purchased the High Island Ranch, did the BLM want to purchase the High Island Ranch?

A. I can't sit here and categorically say that the BLM wanted to because nobody told me. Was the general impression that they were trying to do some conservation easement program and stuff? Yes. That was common knowledge that they were trying to do some kind of management—you know, I'm not privy to that, but I knew they they were working some other deals.

Q. Was it your understanding that the BLM wanted to acquire the High Island Ranch either in conjunction with [19] their Wyoming Game & Fish or with the Forest Service?

MR. ROBERTS: Objection, leading.

Q. (BY MR. FRENCH) Go ahead.

A. What did you understand—did you know who in the office was working on that, I mean who in management?

A. I would imagine it would be top management, realty, rec, wildlife, range, they had to be all working together to do any kind of agreements or whatever.

Q. Had you done work with High Islands Ranch before it was purchased by Mr. Robbins?

A. What do you mean sir?

Q. Had you done compliance work on the High Island Ranch?

A. Sure.

Q. And who was the owner on the High Islands Ranch, if you know, when you—

A. George Nelson was a sublesee at the time. In other words, there was a mix of cattle on the ranch.

Q. And at some point in time did you become aware or did you hear that Mr. Robbins had purchased the High Island Ranch?

A. Sure. Yes, sir.

Q. And how did you find out about that or what did [20] you hear about his purchase of the High Island Ranch?

A. The first thing I heard was the rich SOB from Alabama got it. That's how I found out about it.

Q. Do you remember who said that?

A. Not exactly, sir.

Q. Was that just what I would call coffee talk or how was that rich—you heard something about the rich SOB.

A. Yeah, it was when you cruise in there in the morning and all the range staff, they always got together and plot out the day, and yea, that was the way it came across.

Q. Do you know why—did you come up with an impression about why—I mean, somebody might be called a rich SOB in kind of a joking way and sometimes it might be in a way that they were pretty serous. Did you take it that this attitude was serious or people were joking about it when they called him an rich SOB?

A. Oh, I think I let most things like that pass personally. You know what I'm saying? Did I form an opinion down the road? Sure.

Q. As time passed, did you hear any more comments, negative comment about Mr. Robbins purchase of the High Island Ranch from the people at the BLM?

MR. ROBERTS: Objection, leading.

Q. (BY MR. FRENCH) Go ahead.

[21]

A. I knew that there was a meeting upstairs towards the beginning of Frank's - and I don't think it was right after he took possession or showed up here, physical possession. And they were quite upset at something with him and that they thought he was unreasonable and he had a tape recorder and this was gong to be a heck of a fight. That's all I remember about that.

Q. How did you get that information or who did you hear this from?

A. I believe my supervisor at the time.

Q. Who was your supervisor at the time?

A. Gosh, I think it was Jim Cagney.

Q. And he was relating to you information and that's how you formed that opinion, right?

A. Yes, sir.

Q. But you didn't hear management—

A. No.

Q. —at that point?

A. No, I was never privy to that.

Q. Did there come a time when you heard any management people, specifically Mr. Vessels, say anything negative about Mr. Robbins?

MR. ROBERTS: Objection, leading.

A. I'm not spacing out on you. I'm thinking. I'm searching for the words. Mr. Vessel's attitude towards [21] Frank Robbins changed immensely.

Q. (BY MR. FRENCH) From the time he purchased it?

A. From—yeah. Yes, sir.

Q. How did it change?

A. Things changed immensely. It's like a snowball.

Q. And in what way did they change over time?

A. It just got worse and it got worse and it got worse. They wouldn't negotiate. I was led to believe one thing and I couldn't find what I was lead to believe happening. Now, I don't know, Tom what goes on in realty don't

know what goes on with recreation, but fortunately or unfortunately, in that office if you're a team player, individuals I involved in this stuff will divulge suff.

Q. Okay. So—

A. And the attitude just got worse and worse and worse toward Mr. Robbins, and pretty soon I was being asked to do things that I wasn't authorized—I shouldn't have been authorized too, look at easement stuff and look at right-of-way stuff and look at - asked to go out and was worried about range and I didn't have a range problems with Mr. Robbins.

Q. Were you—you said Mr. Vessels' attitude changed immensely over time. What did it become overtime?

[23]

What did it change from?

A. It changed from a professional attitude towards a hostile attitude.

Q. Did you ever find out why or do you know why Mr. Vessel's attitude changed? Did he ever tell you?

A. Not in a lot of words not in specific words, I should say.

Q. Did you come to any conclusions about why Mr. Vessel's attitude had changed over time about Mr. Robbins?

A. Conjecture and opinion, okay. Yes, sure I do.

Q. What is it?

MR. FRENCH: I would object to stating a conjecture opinion.

Q. (BY MR. FRENCH) Go ahead.

A. Searching for words. It has been my experience that people given authority and not being held in check and not having solid convictions will run amuck and that it what I saw happening.

Q. Do you know why—did Mr. Vessels ever express [24] to tell you anything about why he began to have a hostile attitude toward Mr. Robbins?

MR. ROBERTS: Objection, leading. It states facts not in evidence.

Q. (BY MR. FRENCH) Go ahead.

A. I knew they were having trouble with recreation-permits. They were having trouble with his dude operation, they were having trouble the easement right-of-way, they were having trouble negotiating and it just —of course, I'm not privy to what was going on in the back, but that was the general attitude. It was just getting hostiler and hostiler as we went on.

Q. Did you ever hear Mr. Gene Leone say anything negative about Mr. Robbins?

MR. ROBERTS: Objection, leading.

A. Yes, sir, I did.

Q. (BY MR. FRENCH) Tell me about that.

A. Well, I'll tell you where it started. That started when Mr. Robbins had his little affair with Mrs. Pennoyer up on the water hole on the Rock Creek route. The day after that happened, I walk in the office, Mr. Leone was on the computer and had been in contact with Hot Springs County Sheriff's Department and was

getting all kinds of involved in whatever was going on with this civil thing with Mrs. Pennoyer, and he looked me straight in the eye [25] and he says, "I think I finally got a way to get his permits and get him out of business." quote.

Q. And did you ever hear Mr. Leone say anything like that?

A. That continued. That wasnt a one-day thing. From that point on, that was a doily admission from Mr. Leone.

Q. Did that attitude ever go to anybody else in the BLM?

A. How could it not when Mr. Wilkie and Mr. Vessels and half the crew is standing around watching him and listening to him?

Q. Did you ever—did anyone ever at a range meeting—did Mr. Barnes ever express anything in range meeting or any other time about getting Mr. Robbins?

MR. ROBERTS: Objection, leading.

A. Mr. Barnes would gave never said a word to me. I don't thin I spoke ten words to Mr. Barnes my whole time there.

Q. (BY MR. FRENCH) At this point in time, this is about the time you just expressed what you heard Mr. Leone say these things, did it appear—did Mr. Vessels have this hostile attitude toward Mr. Robbins?

MR. ROBERTS: Objection, leading.

A. Of course we all did.

[26]

Q. (BY MR. FRENCH) When you say, "We all did," do you mean "we all did"?

A. Up to that point I was doing everything I could to find anything I could on Mr. Robbins in a range category. Everything I found he took care of.

Q. Who took care of?

A. Mr. Robbins and his people. If I found a problem on Mr. Robbins' ranch, I called Mr. Robbins and said "You got four cows out." He would get a hold of Dave Armstrong and I'd get a hold of his ranch foreman and they'd go get them. If they had problems at the time, they would take care of it for me. I found project problem on the fence lines. He sent a crew out and fixed it. He had just taken possession of a poorly managed ranch. So, I couldn't find anything, and anything I did find was never willful or appeared willful, and in my investigations and if you look back at my service records, you'll find out that anything I submitted was solved.

Q. Did you have—in your view, was Frank Robbins treated differently than other permitees?

MR .ROBERTS: Objection, leading.

A. Of course he was.

[27]

Q. (BY MR. FRENCH) Was he treated differently by you?

A. I tried not to. I tried not to let this momentum thing that was happening happen to me, too. I tried to stay objective. I tried to do my job and do it right.

Q. In your opinion, did other members—let me put it this way: Did Mr. Leone treat Mr. Robbins differently than other permittees?

MR. ROBERTS: Objection, leading.

A. I wouldn't know because I wasn't privy to what Mr. Leone was doing with his other permitees. All I knew is what he was spouting of to me.

Q. (BY MR. FRENCH) Okay. In your view, was Mr. Leone's spoken statements about what he was going to do to Mr. Robbins, were they appropriate or within the appropriate mission of the BLM?

A. I'm going to expound here a little bit if it's okay.

Q. Well, can you answer the question, yes or no?

A. Repeat the question.

Q. Do you think Mr. Leon's statements to you were within the appropriate mission of the BLM?

A. No.

Q. Do you remember Mr. Vessels saying anything about treating—or do you remember Mr. Vessels ever giving [28] approval to Mr. Robbins begin treated differently than other permitees?

MR. ROBERTS: Objection, it's leading.

Q. (BY MR. FRENCH) Go ahead.

A. I was never told to treat him any different than anybody else. I was told to look closer, stay on top of it. Telling me, that means I'm going to do my job, so if I'd have found something, I would have turned it in.

Q. But you were told to look closer at Mr. Robbins than other permitees?

A. At the time that was the emphasis was the High Island Ranch.

Q. Was there—did you ever hear anything else like that, kind of general attitude?

A. Well, up to the point where I—up to about the point you just asked me about, sure, all of us. It's kind of how it works, Tom. Let me explain something to you real quick, okay, if you don't mind.

Q. Sure.

A. In a perfect world, it would be nice of all the permitees were treated exactly the same, but it's not a perfect wold, and if people followed the SOP and the [29] mission and goal statements of the BLM, I don't think we'd be sitting here. Do you understand what I'm saying? There is no reason for the guy on this range site and this range site with a fence separating them, same everything to have a totally different Allotment Management Plan and totally have different socioeconomic effects on the community when their mission is to stabilize socio-economic impact on the community to help these ranchers make a go of it and help them facilitate proper management of the land or we wouldn't be here. Do that's just the way it is.

Q. Were you specifically asked to do anything special or extra or above in regard to Mr. Robbins?

A. Just spend more time there, look closer, watch closer, investigate harder.

Q. Did Mr. Wilkie ever say anything to you about Mr. Robbins that you recall.

A. Mr. Wilkie, yeah.

Q. What do you remember Mr. Wilkie saying?

A. That if I could find anything, to find it.

Q. Do you remember Mr. Leone ever saying anything about wanting to bury Frank Robbins?

MR. ROBERTS: Objection, leading.

A. Bury, I can't remember, Tom.

Q. (BY MR. FRENCH) Did you ever see cattle in trespass on the High Island Ranch from Frank's neighbors [30] that you recall?

A. Yeah, I believe I did. I think that was on Wagonhound Creek.

Q. Did there come a time when you talked with Mr. Vessels about going to talk with Mr. Robbins?

A. Yes, sir.

Q. Tell us about that.

A. Well, I saw what was going on, and of course, I had not authority or privy to this other stuff, that was going, easement to rage—I mean recreation, things like that, but I saw things that were getting really out of hand and I knew I could talk to Frank. Joe called me in his office and he asked me, he said, "You seem to have a rapport with Mr. Robbins, Would you go explain our side to him."

And I tried to explain our side to him. I went out and had this talk with Frank and his wife Karen, and actually you got to remember as a GS-7 range tech, I had no negotiating authority.

Q. And what was the BLM position that you tried to explain to Mr. Robbins?

A. Basically that he had better adhere to the AMP that he had purchased or it was going to get real ugly, and I told Mr. Robbins that if he wanted to avoid this situation on the range land—I had no idea what to tell [31] him about this other stuff because I'm not an easement and realty specialist , I'm a range guy. I told him, "If you want to avoid this range plague that your having with these guys, fence your private out of them, percent federal or not, fence your private, get a trailing permit and do what you want on your private," but as long as you were going to have to deal with them in this AMP, I advised him to follow.

Q. And did you—when you talked with Mr. Robbins about this, did you express to him anything about your being tired of having this role or working for the BLM in this situation?

A. Oh, Yeah.

Q. What did you tell him?

A. Just flat out that I—I Can't do this anymore.

Q. Can't do what anymore?

A. Play these political games when what's really at hand here is the range to me. I mean, this is out of control and I told Mr. Robbins that and I said, "There's not much I can do to help you and I've been through this

two or three times with other permittees, and I'm just a GS-7 range tech and I've got plenty of documentation to retire and I'm getting out of it. Good luck."

Q. Did you tell Mr. Robbins anything like that of he—it was going to get ugly or there was going to be war [32] with the BLM or something like that?

A. You bet I did.

MR. ROBERTS: Objection, leading.

Q. (BY MR. FRENCH) Which, if any, of those things did you say?

A. I told him there would be war, a long war and they would outlast him and outspend him. And boy, sure got ugly after that.

Q. So after you spoke with Mr. Robbins, did you go back and talk with Mr. Vessels?

A. Yes, sir.

Q. And what was your conversation with Mr. Vessels?

A. I told him exactly what Mr. Robbins had told me, which was he wasn't going to let them tell him what to do as far as his private land went, and that I couldn't be of any more assistance, and Joe said, "That's fine, it's out of your hands. We'll take care of it."

Q. And how much longer did you stay with the BLM after that?

A. Three months maybe, two. Within a week or two I put in for my retirement.

Q. And why is it that you retired at that point in time?

A. The technical reason, the paper reason or why I retired?

[33]

Q. In your heart.

A. I was over it.

Q. Did it have anything to do with Frank Robbins and how he was being treated?

MR. ROBERTS: Objection, leading.

A. Frank Robbins was the volcanic point, yes. Was he the reason? Heck, no. He was the volcanic point.

Q. (BY MR. FRENCH) And who did you—did you announce your retirement to anybody face to face?

A. Joe Vessels.

Q. What was his reaction?

A. He went ballistic.

Q. Do you know why that was?

A. No. I have no ide

A. I walked in and I told him. I said, "I think I have enough documentation to retire with a disability retirement and I'm applying," he said, "Don't I have nothing to say about that?" And I said, "Nope. You're my manager, but your not office personnel management. They will make that decision and if I qualify, I'm taking it, and if I don't, you're stuck with me, so you better transfer me after that because I'm disgruntled." That was in his office.

Q. Do you believe in the mission of BLM?

A. Yes.

Q. Has your retirement from the BLM been difficult?

* * * * *

[36]

Q. (BY MR. FRENCH) Mr. Parodi, I don't have a whole bunch more questions. I have a few, after I get done, Mr. Roberts will have an opportunity to ask you questions. . . . Was there ever a time when you saw cattle out on Mr. Robbins' place and a neighbor's place and you went to ask Mr. Vessels what you should do about that?

A. I don't remember Tom. Gosh.

Q. Do you remember a time specifically when Mr. Vessels asked you to treat Mr. Robbins differently?

MR. ROBERTS: Objection, leading.

A. Again, I was led to believe that I needed to spend more time doing my job on the High Island Ranch, which obviously meant looking for something to trespass for or at least keeping him in compliance.

Q. (BY MR. FRENCH) I believe you mentioned that you were sent out to look for and find anything you could on Frank Robbins. Who would send you out to do that, who would tell you to do that?

A. Gene Leone, Chuck Wilkie, Joe Vessels.

Q. Who was Joe Vessel's boss?

A. Darrell Barnes, I imagine. Or his immediate supervisor, I think, at the time it was Chuck Wilkie and then up the ladder.

MR. FRENCH: I have no further questions.

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No. 06-219

# In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTIONS PRESENTED

This case involves a damages action brought against officials of the Bureau of Land Management in their individual capacities based on alleged actions taken within the individuals' official regulatory responsibilities in attempting to obtain a reciprocal right-of-way across private property intermingled with public lands. The following questions are presented:

1. Whether government officials acting pursuant to their regulatory authority can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, of the predicate act of extortion under color of official right for attempting to obtain property for the sole benefit of the government and, if so, whether that statutory prohibition was clearly established.

2. Whether respondent's *Bivens* claim based on the exercise of his alleged Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

## PARTIES TO THE PROCEEDINGS

Petitioners are Charles F. Wilkie, Darrell C. Barnes, Teryl Shryack, Michael Miller, Gene J. Leone, and David L. Wallace. Respondent is Harvey Frank Robbins, Jr.

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## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 755. An earlier opinion of the court of appeals (Pet. App. 76a-84a) is reported at 300 F.3d 1208. The opinion of the district court (Pet. App. 27a-48a) is unreported. An earlier opinion of the district court (Pet, App. 49a-75a) is reported at 252 F. Supp. 2d 1286.

### JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006. A petition for rehearing was denied on March 14, 2006 (Pet. App. 85a-86a). On June 5, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 12, 2006. On June 28, 2006, Justice Breyer further extended the time to August 11, 2006, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 1, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> * * * nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The Hobbs Act provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> * * * * *

18 U.S.C. 1951.

## STATEMENT

1. To this day, much of the American West resembles a complex checkerboard of intermingled parcels of federal, state, and private lands. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979). The management of those lands, along with attendant resources such as wildlife, land values, grazing

allotments, and livestock, presents unique challenges for federal officials and depends on negotiation and cooperation between federal, state, and private landowners. Under its Property Clause power, Congress has enacted numerous statutes governing the use and management of federal lands. Pursuant to those laws and implementing regulations, the federal government has granted private landowners thousands of rights-of-way and grazing permits to enable them to access and use public lands for particular purposes. In turn, private landowners have agreed through reciprocal rights-of-way and other instruments to grant federal officials the access needed over private lands to reach and manage public lands. Both the federal government and private landowners alike benefit from those arrangements. Indeed, given the interspersed nature of lands, public as well as private land use in the West would be severely impeded in many areas without such give and take.

The Secretary of the Interior is authorized under 43 U.S.C. 1761(a), a provision of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, to grant rights-of-way over federal lands. FLPMA requires the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. 1732(b). Similarly, under 43 U.S.C. 315, a provision of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, the Secretary has the authority to grant owners of land adjacent to grazing districts rights-of-way over federal land in those districts. The Secretary has the power to "do any and all things necessary" to accomplish the purposes of the Act. 43 U.S.C. 315a.

The Bureau of Land Management (BLM), an agency within the Department of the Interior, has provided that the Secretary may grant rights-of-way to business entities, among others, and "regulate, control and direct" the use of those rights-of-way on public land to "[p]rotect the natural resources associated with the public lands" and to "[p]revent unnecessary or undue environmental damage to the lands and

resources." 43 C.F.R. 2800.0-2(a) and (b) (2004). When it determines it to be in the public interest, BLM may require persons applying for a right-of-way over public land to give the government an "equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. 2801.1-2 (2004).[1]

If an applicant for a right-of-way refuses to grant BLM a reciprocal nonexclusive easement, his application may be denied. *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991); see *Frank Robbins*, 146 I.B.L.A. 213, 219 n.4 (1998) (regulation authorizes BLM to "require that a road [right-of-way] applicant grant an equivalent, reciprocal [right-of-way] to the United States as a condition to receiving" a right-of-way under FLPMA). BLM's regulations likewise provide that the agency may include in a grazing permit a "statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. 4130.3-2(h). Because BLM must often cross private lands to access public land, BLM would not be able to carry out its statutory management duties without such reciprocal rights.

BLM actions are subject to a comprehensive system of administrative review, including review by the Interior Board of Land Appeals (IBLA). IBLA decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* *See Hoyl* v. *Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997).

2. This case involves an expanse of land in Hot Springs County, Wyoming, located near the foot of Washakie Needles Peak and buttressed by the Shoshone National Forest to the west and the Wind River Indian Reservation to the south. As illustrated by the map reproduced on page 136 of the Joint Appendix, the area consists of scores of intermingled parcels

[1] The regulations were altered in 2005, but analogous provisions are currently set forth in, *inter alia*, 43 C.F.R. 2801.2, 2804.25(d)(3), and 2805.12(i)(7).

of federal, state, and private lands and is divided up into various grazing allotments managed by BLM. The area also has significant natural resources, including wildlife such as elk, mule deer, pronghorn antelope, prairie dog colonies, and sage grouse, that BLM is responsible for managing along with other federal officials.

A privately owned cattle ranch—the High Island Ranch—runs for miles through the heart of this area, intersecting federal and state lands, as well as other private lands, and spanning several grazing allotments. In many places, it is not possible to get from one part of the ranch to another without crossing federal, state, or other private land. A dirt road known as South Fork, Owl Creek Road (denoted as BLM 1310 on the map, J.A. 136) wanders generally westward from a county road (County Road 29) several miles to the east along the southern portion of the ranch. Along the way the road crosses federal, state, and private land. The road is the only access route for parts of the ranch as well as public lands intermingled with the ranch. J.A. 45-46.

The High Island Ranch is a working cattle ranch that also has engaged in commercial operations including a guest ranch offering cattle drives and a big game hunting outfit. Because the ranch is interspersed with public lands and has used large tracts of public lands as part of its commercial and private ranching operations, a mutually beneficial legal relationship developed between the government and the previous owner of the ranch. BLM granted George Nelson, who owned the ranch before 1994, a livestock grazing permit, a special recreational use permit (SRP) enabling him to conduct guest activities including cattle drives and hunting on public lands, and a right-of-way allowing him to use and perform maintenance on South Fork, Owl Creek Road on a 53-acre portion of public lands. See Pet. App. 28a-29a; J.A. 97-103. In exchange, Nelson agreed to various conditions on the use of public lands. In addition, he granted the United States a reciprocal right-of-way in the form of a nonexclusive easement to use and main-

tain the South Fork, Owl Creek Road on a 15.5-acre stretch of the ranch's land. J.A. 90-93.

Respondent acquired the High Island Ranch from George Nelson in May 1994. Pet. App. 28a. While respondent sought to continue to utilize the grazing permits, SRPs, and right-of-way that BLM granted Nelson in order to conduct his commercial and private ranching activities on public lands, respondent wanted none of the reciprocal arrangements that had accompanied those privileges. An issue quickly arose over the right-of-way over South Fork, Owl Creek Road. When Nelson acquired the right-of-way over the road on public land, he signed a document granting the United States a reciprocal right-of-way over the road on his land. But, apparently because a corporate seal was missing, BLM returned that document to Nelson. Before Nelson sent the document to BLM with a corporate seal, he sold the ranch to respondent, who recorded the deed. BLM determined that this recording of the deed without the easement in favor of the government rendered the easement unenforceable. *Id.* at 2a; C.A. App. 48-49.

In February 1995, a BLM employee discussed with respondent the possibility of receiving an assignment of Nelson's right-of-way over federal lands, and in April 1995, Charles Wilkie wrote to respondent explaining that such an assignment was necessary if respondent intended to maintain the road or engage in other than casual use of the road on federal land. The letter confirmed that "a condition of the right-of-way is the reciprocal grant of a non-exclusive easement to the United States for administrative access across your deeded lands in the Rock Creek area." The letter enclosed a copy of the easement that Nelson had signed and asked respondent to sign it. C.A. App. 30-39. Respondent did not respond to the letter. On June 16, 1995, BLM issued an interlocutory decision cancelling the right-of-way that Nelson had obtained because respondent had not made the required annual payment and had not signed a reciprocal non-exclusive

easement. *Id.* at 40-41. Respondent did not respond, and on July 21, 1995, BLM issued a final decision cancelling the right-of-way. *Id.* at 42-43. Although this final decision was subject to administrative review before the IBLA and judicial review in district court, respondent did not seek any such review. *Id.* at 49-50.

In July 1997, BLM issued respondent a "cease and desist" notice, which alleged that respondent had "bladed" parts of the road on public land without a right-of-way. C.A. App. 49. "Blading" is a smoothing operation in which loose material is pulled from the side of the road or material is used to fill surface irregularities and restore the road crown. Under 43 C.F.R. 2801.3(a) (2004), the use of public lands requiring a right-of-way without authorization is a trespass. In response, respondent submitted an invoice "for emergency repairs to South Fork Road in order to access private property—$2250.00." C.A. App. 49; *id.* at 44. BLM offered to settle the trespass charges for $1617 and offered to entertain an application for a right-of-way, stating explicitly that the reciprocal easement required of respondent would simply allow "access for federal employees in conjunction with their official duties; it would not allow any other type of access." *Id.* at 45. Respondent did not respond, and BLM issued a decision finding that he had trespassed and owed BLM $1617. *Id.* at 48.

Respondent sought review before the IBLA, which upheld the decision. The IBLA held that respondent had admitted the blading when he sent his bill to BLM for the repair and that he had "repeatedly failed to respond to BLM offers concerning the existing [right-of-way], the filing of an application for a new [right-of-way] and, thereafter, the settlement of the trespass." *Robbins*, 146 I.B.L.A. at 218. The IBLA also rejected respondent's allegations that BLM was trying to "blackmail" him into providing a reciprocal right-of-way, and it held that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of this decision.

Respondent also had disputes with BLM over his grazing permit. Based on 43 C.F.R. 4130.3-2(h), the permit stated that respondent was required to "provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." C.A. App. 54. Respondent, however, insisted that BLM employees obtain his advance written permission. The IBLA found that "BLM is authorized reasonable administrative access across [respondent's] private and leased lands" and that "[a]dvance written permission from [respondent] shall not be required." *Ibid.* The IBLA later ruled that "administrative access is an implied condition of a grazing permit" when such access is necessary for BLM to carry out its statutory duties. *Id.* at 56; see *id.* at 61. The IBLA explicitly rejected the argument that BLM's administrative access over the ranch constitutes a taking under the Fifth Amendment. *Id.* at 62. Respondent did not seek judicial review of those orders.

Respondent also had a dispute with BLM over his SRP. Respondent had assumed Nelson's SRP, which had a five-year term, but after respondent had committed numerous violations of the SRP's terms, BLM suspended the SRP in 1995 and reduced it to a one-year term, a form of probation. In June 1999, BLM denied respondent's application to renew the SRP, citing the earlier suspension, the blading incident described above, ten grazing trespass notices respondent had received, some in conjunction with SRP activities, and his noncompliance with his grazing permit and allotment management plan on at least 20 occasions other than the trespasses. C.A. App. 70-76. The IBLA upheld BLM's denial of the renewal of the SRP, holding that "the entire record and the pattern of violations represented by the repeated notices he has received since receiving the first SRP in 1994 provide more than a reasonable factual basis for BLM's decision in this case not to renew the permit." *Id.* at 75. Respondent did not seek judicial review of that order.

3. In August 1998, respondent brought an action against petitioners under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, charging BLM employees with seeking to extort a reciprocal easement from him. Petitioners moved to dismiss for failure to state a claim and based on qualified immunity. The district court granted that motion. It dismissed the RICO claims on the ground that the plaintiff had not sufficiently pleaded damages, and the *Bivens* claim on the ground that the availability of judicial review under the APA, 5 U.S.C. 701 *et seq.*, and the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, precluded a *Bivens* cause of action in this context. J.A. 33-40.

The court of appeals reversed and remanded. Pet. App. 76a-84a (*Robbins I*). First, it held that respondent had adequately pleaded damages in support of his RICO claim. *Id.* at 78a-80a. Second, the court held that respondent's *Bivens* claim was precluded to the extent that it was based on final agency action. However, the court further held that, because the APA does not provide a remedy "for constitutional violations committed by individual federal employees unrelated to final agency action," respondent's allegations of misconduct "unrelated to any final agency action" are "properly within the scope of a *Bivens* claim." *Id.* at 81a-82a. The court also rejected the argument that respondent's *Bivens* claim was "precluded by potential claims under the FTCA." *Id.* at 83a.

Following a remand, respondent filed a second amended complaint, and petitioners moved to dismiss on the ground of qualified immunity. The district court granted the motion in part and denied it in part. Pet. App. 49a-75a (*Robbins II*). The court held that respondent had alleged violations of clearly established law under the Hobbs Act, 18 U.S.C. 1951 (extortion), and state law. Pet. App. 60a-61a. The court also held that respondent had alleged the violation of a clearly established right not to be retaliated against for the exercise

of a Fifth Amendment right to exclude others from his property. *Id.* at 72a-74a. But the court dismissed claims under the Fourth Amendment for malicious prosecution, *id.* at 62a-67a, and under the Fifth Amendment for procedural and substantive due process, *id.* at 67a-72a.

Limited discovery ensued. Petitioners then moved for summary judgment based on qualified immunity. Respondent also filed a third amended complaint, mostly reiterating the allegations of the second amended complaint and adding petitioner David L. Wallace as a defendant. The district court again denied petitioners' motion. Pet. App. 27a-48a (*Robbins III*). Based on its earlier decision, the court held that both the law underlying the RICO claim and the constitutional right at issue in the *Bivens* claim were clearly established and that qualified immunity had to be denied. *Id.* at 33a-39a. The court declined to reconsider its holding based on the materials submitted on summary judgment. *Id.* at 39a-48a.

4. The court of appeals affirmed. Pet. App. 1a-26a.

The court began with respondent's *Bivens* claim that petitioners' "conduct violated his right to be free from retaliation for exercise of his Fifth Amendment right to exclude others from his property." Pet. App. 10a-11a. The court rejected petitioners' threshold contention that respondent's *Bivens* claim is completely precluded by the APA, pointing to its decision in the prior appeal in this case. *Id.* at 25a.

As to the merits of the *Bivens* claim, the court acknowledged that "the government has not effected a taking in this case," but nonetheless held that respondent had pleaded a violation of a clearly established Fifth Amendment right. Pet. App. 13a. The court explained that the Fifth Amendment not only protects a "right to exclude" the government from one's property by requiring just compensation, but "prevent[s] the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a; see *id.* at 14a ("[Respondent] has a Fifth Amendment right to prevent BLM from taking his property when BLM is

not exercising its eminent domain power."). And, according to the court, that "Fifth Amendment right" was clearly established. *Id.* at 15a.

The court further held that the Fifth Amendment "right to exclude" includes an anti-retaliation prohibition. The court explained that, "[b]ecause retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful." Pet. App. 15a. Although the court recognized that there was no precedent supporting a right against retaliation for the exercise of a Fifth Amendment right, the court pointed to a Tenth Circuit retaliation case in the First Amendment context and held that a plaintiff need only show "that the right retaliated against be clearly established." *Id.* at 16a. The court, therefore, held that petitioners were not entitled to qualified immunity on the *Bivens* claim.

The court also denied qualified immunity on the RICO claim. The court rejected petitioners' argument that the predicate act for extortion under color of official right under the Hobbs Act required a showing that the alleged conduct was independently wrongful. Although the court did not question that petitioners had regulatory authority to take each of the allegedly retaliatory acts, it concluded that "if [petitioners] engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." Pet. App. 18a. The court also concluded that respondent had stated a RICO predicate act of extortion under Wyoming law. *Id.* at 24a. The court further held that, viewed at the "proper level of generality," respondent had alleged a violation of "clearly established statutory rights." *Id.* at 21a-22a.

## SUMMARY OF ARGUMENT

The court of appeals' decision in this case subjects federal officials to damages actions and threat of personal liability under RICO and *Bivens* for carrying out their regulatory duties to manage public lands. That decision represents an unprecedented expansion of RICO, *Bivens*, and the Fifth Amendment, contravenes settled qualified immunity principles, and should be reversed by this Court.

I. Petitioners did not violate RICO or any clearly established right against extortion in attempting, through the exercise of their lawful regulatory authority, to secure a reciprocal easement for the United States in exchange for the right-of-way that BLM granted respondent over public lands. RICO —an organized crime statute—was never designed to reach federal officials acting to further legitimate governmental aims. In addition, to establish the predicate offense of extortion, a plaintiff must show both that government officials act with a "wrongful" intent, *i.e.*, that they seek something of value that they are not due in exchange for official conduct, and that the officials actually "obtain" something of value for the private benefit of themselves or another. Both of those traditional elements of the common law offense of extortion are absent here.

Petitioners did not take any of the alleged actions based on a "wrongful" intent to obtain property, and, more to the point, the court of appeals assumed that all of petitioners' actions were within their regulatory authority. Moreover, in seeking a reciprocal easement, petitioners did not seek anything that was not "due" to them or BLM. To the contrary, it is well-established that BLM may require persons who apply for rights-of-way over public land to agree to grant the government a reciprocal easement over private land. Likewise, petitioners did not "obtain" any property through their official conduct for the private gain of themselves or another.

They sought the reciprocal easement at issue for "the UNITED STATES OF AMERICA, and its assigns." J.A. 86.

Regulators who act within their lawful authority and seek to obtain property on behalf of the United States are neither racketeers nor extortionists. There are numerous checks in place to deter and prevent overzealous regulation, including the APA. But Congress never intended to subject aggressive regulators to the threat of personal liability and treble damages under RICO. The court of appeals' decision extending RICO to such conduct not only represents a radical extension of RICO, but threatens to chill government officials in a broad range of regulatory contexts from engaging in appropriate and vital regulatory actions, including the negotiation of reciprocal rights to facilitate access to and management of the millions of acres of public lands in the West that are intermingled with private lands.

II. Respondent's unprecedented *Bivens* claim based on the alleged violation of his Fifth Amendment "right to exclude" the government from his property fares no better. As a threshold matter, this Court has repeatedly refused to extend the constitutional cause of action inferred in *Bivens* to new contexts and there is no reason to reverse course here. Indeed, claims—like respondent's—grounded on the Fifth Amendment's Just Compensation Clause are fundamentally incompatible with *Bivens* because that Clause itself specifies a money remedy, *i.e.*, "just compensation," and for nearly 200 years before the *Bivens* decision was handed down Congress created specific mechanisms for dealing with takings and just compensation claims that did not require the courts to infer a direct cause of action in the courts.

Moreover, the APA's comprehensive scheme for challenging agency action in itself precludes a *Bivens* action over the types of agency actions at issue, which respondent had an opportunity to challenge—and in numerous respects did challenge—before the agency with a right of APA review in the courts. Although the APA does not permit challenges to

non-final agency action, there is no basis to infer a constitutional *Bivens* action to cover actions that Congress deemed to be too premature or insignificant to warrant a judicial remedy under the APA. A *Bivens* action was designed to provide a remedy for a victim for whom it was damages or nothing; it is not a gap-filler for perceived holes in the APA.

In any event, even if this Court were to extend *Bivens* to this new context, the court of appeals erred in holding that the Fifth Amendment embodies an anti-retaliation right, much less that such a Fifth Amendment right was clearly established. The constitutional retaliation doctrine has thus far been limited solely to the First Amendment context. That squares with the special nature of expressive activity and the unique concerns that this Court has identified about chilling such activity. Those concerns are absent or greatly reduced in the Fifth Amendment context because the textual guarantee of "just compensation" itself provides a powerful incentive for vindicating Fifth Amendment rights, and the Fifth Amendment tolerates a broad degree of government interference that is wholly alien to the First Amendment. While the Fifth Amendment does not confer an anti-retaliation right, the First Amendment protects individuals who petition the government for redress of alleged Fifth Amendment violations. No such First Amendment claim, however, is presented here.

Furthermore, respondent has not alleged the violation of any substantive right protected by the Fifth Amendment's Just Compensation Clause. Respondent has made clear that he is not alleging that any of his property rights have been *taken* by the government. Instead, he claims that he is entitled to enjoy a right-of-way over *public* land (along with other privileges such as grazing rights and special use permits for the use of public land) while refusing to grant the government a reciprocal easement over his own land. This Court has never held that the Fifth Amendment erects a constitutional barrier to the sort of give and take that is customary between

neighboring landowners. Indeed, in *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 681 (1979), the Court specifically envisioned that "negotiation" and "reciprocity considerations" would be utilized to ameliorate disputes concerning interlocking parcels of public and private lands. Nothing in the Fifth Amendment or this Court's cases confers upon respondent the right to use public lands for his private benefit while denying BLM the reciprocal right-of-way it seeks to manage and protect interlocking public lands.

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' QUALIFIED IMMUNITY DEFENSE TO RESPONDENT'S RICO CLAIM

RICO provides civil remedies for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C.] 1962." 18 U.S.C. 1964(c). Section 1962 in turn makes it unlawful, *inter alia*, for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Racketeering activity includes extortion as defined under the Hobbs Act, 18 U.S.C. 1951(b)(2), and "any act or threat involving * * * extortion * * *, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. 1961(1)(A) and (B).

The court of appeals held that a RICO predicate act of extortion under the Hobbs Act or state law may be shown by allegations that government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government and the public, with *no allegation that they sought any private gain* for themselves or another. That holding expands RICO to an entirely new context and disregards essential requirements of the predi-

cate offense of extortion. Aggressive regulators are already subject to the check of review under the APA or the statute authorizing agency action, as well as by government ethics requirements, inspectors general, and other protections against government misconduct. The enormous threat of personal RICO liability was never designed to check overzealous regulation in itself. Thrusting RICO into this context would chill government officials in a broad range of regulatory contexts from engaging in appropriate and vital regulatory actions.

### A. Government Officials Do Not Become Racketeers Or Extortionists Merely By Taking Overzealous Regulatory Actions

The court of appeals' RICO decision underscores the growing concern that civil RICO has evolved far beyond its animating concern—combating organized crime. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2004 & n.7 (2006) (Thomas, J., concurring in part and dissenting in part). Whatever the outer boundaries of RICO outside the organized-crime context, there is no evidence that the Congress that enacted RICO sought to hamstring the ability of the federal government to regulate by subjecting individual federal officers—even overzealous regulators—to the threat of treble damages and personal liability for acting within their lawful regulatory duties in order to advance the legitimate interests of the government, as opposed to their own personal interests. Moreover, even apart from the limits of the RICO cause of action itself, the predicate act of extortion has never been available for the type of regulatory conduct at issue in this case.

The predicate act of extortion under color of official right addresses the classic situation of abuse of public office for *private* gain. It addresses the *corrupt* public official, not the overzealous regulator. An elaborate web of administrative law is addressed to the latter problem, but it is not the proper

target of the criminal law or civil RICO liability. Where government officials acting pursuant to their authority act unreasonably or exceed legal limits in seeking a benefit for the government or the public, any individual harmed by their conduct may seek to block those actions in administrative proceedings or in court under the APA or other statutory review mechanisms. But they may not hold those officials personally liable for treble damages under RICO. RICO liability is far too blunt an instrument to be used as a check on administrative overreaching, and it was never designed to do so. Fear, violence, and corruption are the trademarks of the prototypical extortionist or racketeer, not due process, elaborate procedural protections, and the right to judicial review.[2]

It is not surprising, therefore, that the one court of appeals that has addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair* v. *Hawke*, 314 F.3d 934, 943 (8th Cir. 2003). In *Sinclair*, the Office of the Comptroller of the Currency took increasingly severe actions against a bank, eventually threatening to issue a safety and soundness order that would have made it difficult for the bank to undertake the kind of lending it planned to engage in and later issuing a notice of charges against the bank. The Eighth Circuit characterized the question before it as "whether Congress has authorized wide-ranging judicial review of regulators' motives in personal damage actions [under RICO] that might have a chilling effect on their willingness to aggressively" carry out their regulatory functions. *Id.* at 939. The court rejected the

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[2] In this case, respondent blocked the government's request for a reciprocal easement by simply refusing to agree to it. Respondent also had the right to administrative and judicial review of BLM's decision to cancel the right-of-way the ranch had obtained under previous ownership, but he did not exercise that right. He did seek administrative (but not judicial) review of other actions by the government and raised the "blackmail" (*i.e.*, extortion) argument, unsuccessfully, before the IBLA. See Part II.A, *infra*.

bank's RICO claim, holding that "federal employees who take regulatory action consistent with their statutory powers [do not] engage in a 'pattern of racketeering activity' if those actions are adverse" to a particular business. *Id.* at 943. In other words, the court declared, "regulators do not become racketeers by acting like aggressive regulators." *Id.* at 944.

By holding otherwise, the court of appeals below has exposed BLM and Forest Service officials like petitioners who regulate intermingled public lands; bank regulators like the defendants in *Sinclair*; and potentially countless other government officials who negotiate with private parties on behalf of the government to extortion charges under RICO, along with the prospect of personal liability and treble damages, for taking tough regulatory actions or driving hard bargains, even if the officials have no personal interest in the property they seek on behalf of the government. There are many reasons to discourage overzealous regulatory behavior and, accordingly, there are many statutory and regulatory checks on such conduct (including administrative and judicial review under the APA), but nothing in law or logic supports the conclusion that Congress sought to capture—and, indeed, criminalize—such conduct under RICO.

### B. Extortion Requires Showing Both That Government Officials Acted With "Wrongful" Intent And That They "Obtained" A Private Benefit For Themselves Or Others

1. Extortion under color of official right requires a showing that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992). A distinguishing feature of extortion, therefore, is the conditioning of an official act on *private* gain, and it is precisely the taking of property "not due" to the individual official in exchange for official conduct that renders the individual officer's action "wrongful." See *id.* at 260 n.4 ("Blackstone described extortion as 'an abuse of public jus-

tice, which consists in an officer's unlawfully taking, *by colour of his office*, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.' 4 W. Blackstone, Commentaries *141."); *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that *was not due to him* under the pretense that he was entitled to such property by virtue of his office.") (emphasis added). Where a "wrongful" or extortionate intent is lacking, government officials may still be guilty of overreaching or otherwise acting unreasonably or unlawfully, but they are not guilty of extortion.[3]

2. Another critical difference between an overzealous regulator and an extortionist is that an extortionist must actually "obtain" the victim's property for himself or another private party. *Scheidler*, 537 U.S. at 404; see *United States* v. *Gotti*, 459 F.3d 296, 324-325 (2d Cir. 2006) (holding that extortionist must "obtain the right for himself, rather than merely to deprive the victim of that right"). Both of the sources of law that Congress used in drafting the Hobbs Act—the Penal Code of New York and the Field Code—defined extortion as

[3] The requirement that the government official act with a "wrongful" or extortionate intent is well established. One of the New York statutes upon which the Hobbs Act was modeled, for example, provided that an individual committed extortion "under color of official authority" only if he acted "unlawfully," as well as "maliciously," in seizing or injuring another's property. N.Y. Penal Law § 854 (Consol. 1909). See, *e.g.*, *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) ("extortion requires an intent 'to obtain that which in justice and equity the party is not entitled to receive'") (quoting *People* v. *Cuddihy*, 271 N.Y.S. 450, 456 (Gen. Sess. 1934)); 11th Cir. Pattern Crim. Jury Instr., Offense Instr. 66.2 ("Extortion 'under color of official right' is the wrongful taking or receipt by a public officer of property not due to the officer knowing that the payment or property was taken or received in return for [performing] [withholding] official acts. The term 'wrongful' means to obtain property unfairly and unjustly by one having no lawful claim to it.").

"the *obtaining* of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Scheidler*, 537 U.S. at 403 (citing 4 Commissioners of the Code, *Proposed Penal Code of the State of New York* § 613 (photo. reprint 1998) (1865) (*Field Code*); N.Y. Penal Law § 850 (Consol. 1909)) (emphasis added). The Field Code expressly described extortion, along with three other property crimes—robbery, larceny, and embezzlement—as involving "the criminal acquisition of * * * property." *Field Code* § 584 note, at 210. And "New York case law before the enactment of the Hobbs Act demonstrates that this 'obtaining of property' requirement included both a deprivation and *acquisition* of property." *Scheidler*, 537 U.S. at 403 (emphasis added) (citing *People* v. *Ryan*, 133 N.E. 572, 573 (N.Y. 1921); *People* v. *Weinseimer*, 102 N.Y.S. 579, 588 (App. Div.) (noting that in an extortion prosecution, the issue that must be decided is whether the accused "receive[d] [money] from the complainant"), aff'd, 83 N.E. 1129 (N.Y. 1907)). Thus, as this Court reiterated in *Scheidler*, "[e]xtortion under the Hobbs Act requires a '"wrongful" *taking* of . . . property.'" 537 U.S. at 404 (quoting *United States* v. *Enmons*, 410 U.S. 396, 400 (1973)) (emphasis added in *Scheidler*).

The case law does not always require that the official himself benefit from the extortion; there may be extortion if payments are made to a third party at the official's direction. Cf. *United States* v. *Green*, 350 U.S. 415, 420 (1956) (extortion by union through threats of force) ("extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property"); *United States* v. *Clemente*, 640 F.2d 1069, 1079-1080 (2d Cir.) (aiding payment of kickbacks to another), cert. denied, 454 U.S. 820 (1981). But the gravamen of extortion under color of official right historically has been and remains the abuse of public office for *private* gain. See *United States* v. *Deaver*, 14 F. 595, 597 (W.D.N.C. 1882) (explaining that, under the "technical meaning [of extortion] in the common law, * * * [t]he

officer must unlawfully and corruptly receive such money or article of value *for his own benefit* or *advantage*").

### C. Petitioners Did Not Act With A "Wrongful" Or Extortionate Intent And Did Not "Obtain" Any Property For The Private Benefit Of Themselves Or Others

1. Petitioners did not take any action based on a "wrongful" intent to obtain property not due to them in exchange for official actions. Indeed, the court of appeals assumed that petitioners' actions were within their regulatory authority. Pet. App. 17a-18a ("Although Defendants do not enumerate specific regulatory provisions permitting each of their actions, the regulatory authority may exist."). But it nevertheless held that the allegation of an intent to "extort" made their conduct actionable. *Id.* at 18a (If petitioners "engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO."). That was error. Where, as here, government officials act within their regulatory authority—as the court of appeals expressly assumed—and seek to benefit only the government and the public, they act precisely how government officials are expected to act, and there is nothing remotely "wrongful" or extortionist about their actions or intent.

That is particularly true in the context of this case, where, as authorized by regulation, the government sought to obtain reciprocal treatment of interlocking parcels of land. Petitioners did not seek anything that was "not due" to the government. As discussed above, it is well-established that BLM may require persons applying for a right-of-way over *public* land to agree to give the government a reciprocal easement over private land, and that, where private individuals refuse to grant such reciprocal rights, the government may deny them a right-of-way over public land. See pp. 3-7, *supra*. Respondent has never directly challenged the lawfulness of that common-sense regulatory regime in this litigation. In-

stead, his claim is predicated on the extravagant notion that it was extortionate for petitioners even to seek reciprocity.

The government, no less than a typical property owner, may seek through lawful means to encourage a neighboring property owner to agree to a reciprocal property right. The government may have more means at its disposal in negotiating such an arrangement than the typical private property owner, and that may justify a legislature giving the private property owner greater recourse against the government to avoid overreaching, such as the availability of APA review. But there is no basis for converting a legitimate effort by government officials to obtain reciprocal property rights for the benefit of the public into RICO extortion or, as discussed in Part B, *infra*, a *Bivens* claim.[4]

2. Nor did petitioners "obtain" anything of value through their regulatory actions either for their private benefit or the benefit of another. There has never been an allegation in this case that any individual sought or received a benefit as a result of petitioners' administrative actions, and no individual gained or sought to gain any control over respondent's property. Nor could such an allegation have been made. The reciprocal easement, if granted, would have benefitted only "the

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[4] Of course, when it comes to managing public lands, the federal government does stand in different shoes than the typical property owner in an important respect. As this Court has held, the Property Clause gives the federal government broad power over public lands, including the power "to control their occupancy and use, to protect them from trespass and injury and to prescribe conditions upon which others may obtain rights in them." *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917)). Moreover, the government has a duty to manage and protect the Nation's public lands. The facts that this case arises over a dispute involving the management of public lands and that respondent essentially claims a right of access to public lands without having to agree to traditional conditions placed on their use therefore only bolsters the legitimacy of petitioners' actions.

UNITED STATES OF AMERICA, and its assigns," not petitioners or any other individual. J.A. 86.

Petitioners, therefore, are even further removed from the plain terms and purposes of RICO and the Hobbs Act than the petitioners in *Scheidler*, who the Court recognized personally exercised some degree of control over the abortion clinic's business as a result of their illegal and violent acts, even if they did not "obtain" property within the meaning of the Hobbs Act. See 537 U.S. at 404-406 (discussing distinction between extortion and "coercion," a separate common-law offense). Thus, the Court explained that the petitioners in that case "may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property" because they "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.* at 405 (citation omitted). While this case may concern a more tangible property interest than the interest involved in *Scheidler*, there is not even an allegation that petitioners here—government officials acting within the scope of their regulatory authority to protect and further the interests of the government and the public—pursued or received something of value from respondent that they themselves "could exercise, transfer, or sell." The only thing of value underlying respondent's extortion claim is a reciprocal easement for "the UNITED STATES OF AMERICA, and its assigns." J.A. 86. At no point could petitioners, either individually or collectively, have exercised, transferred, or sold the United States' easement.[5]

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[5] In *Scheidler*, the Court refused to replace the Hobbs Act's requirement "that property must be obtained from another * * * with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." 537 U.S. at 405. Thus, the Court concluded that there was "no basis" to find that the petitioners committed extortion, even though there was "no dispute * * * that petitioners interfered with, disrupted, and in some instances completely

### D. The Regulatory Actions At Issue Cannot Support A Claim Of Extortion In Any Event

The specific regulatory actions respondent alleges do not support his claim of extortion for additional reasons. He alleges (Br. in Opp. 10-11) that government employees trespassed on his land, but trespass is not in its nature extortionate. Moreover, what underlies his claims of trespass by BLM officials is really his disagreement with formal IBLA adjudications concerning certain terms in grazing and special recreation permits granting BLM rights to administrative access over respondent's land to inspect interlocking parcels of public land and ensure proper compliance with the limitations contained in the permits. See *Frank Robbins*, 154 I.B.L.A. 93, 95-96 (2000) (describing, *inter alia*, respondent's repeated efforts, in direct violation of IBLA orders, to interfere with BLM's management and protection of interspersed public lands by filing notices of trespass against BLM employees with the local sheriff); see also C.A. App. 61 (noting respondent's continued and mistaken assertion that authorized administrative access over respondent's land to reach interlocking parcels of public lands without prior written consent constituted trespass). BLM's right to such administrative access was established over respondent's objections through proper

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deprived respondents of their ability to exercise their property rights." *Id.* at 404, 409. Such interference, the Court held, might be covered by the "separate crime of coercion," but because the "petitioners did not 'obtain' respondents' property," they could not be guilty of extortion. *Id.* at 405. The RICO extortion claim in this case fails for the same reasons. Indeed, respondent's action is premised on the fact that the government has *not* taken his property, and instead that all of the "actions [at issue] were taken as part of an ongoing scheme to *coerce* [respondent] to grant the BLM an easement." J.A. 76 (emphasis added); see J.A. 77. Thus, even if it were true that petitioners "interfered with, disrupted, and in some instances completely deprived respondent[] of [his] ability to exercise [his] property rights," under *Scheidler* there would be "no basis" upon which to find extortion. 537 U.S. at 404, 409.

administrative proceedings, and respondent declined to invoke his APA right to challenge the results of those proceedings in court.

Respondent also alleges (Br. in Opp. 10-11) that petitioners caused a false criminal charge to be filed against him. But his malicious prosecution claim was resolved against him by the district court, see Pet. App. 62a-67a, and he has not challenged that holding on appeal. Moreover, after respondent was acquitted on the criminal charge at issue, he sought attorney's fees on the ground that the government's position was "vexatious, frivolous, or in bad faith," Act of Nov. 26, 1997, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note). The district court rejected his claim, finding that his allegations of bad faith and improper motive "obviously do not meet the most liberal reading of the requirements for recovery" under the statute. *United States* v. *Robbins*, No. 97-CR-0092, slip op. at 9 (D. Wyo. Apr. 8, 1998) (order denying application for attorney's fees and costs). The court further held that respondent "simply failed to make any showing that the Untied States' position was without color or was baseless, was asserted to harass [respondent], or was asserted for any other improper or malicious purpose." *Id.* at 13. Accordingly, respondent's claim of false criminal charges could not support his extortion claim either.

The central harm that respondent alleges in his RICO and *Bivens* claims stems from BLM's administrative decisions to cancel his right-of-way on interlocking government lands and his grazing and special use permits on government land. The fundamental premise of this action is that petitioners took those regulatory actions to coerce respondent into granting the government a reciprocal easement on his land. See J.A. 76 (Complaint). But it is too late for respondent to allege in this action that the government improperly cancelled his easement and special use and grazing permits. If, as respondent alleges, those actions were taken without authority or were otherwise illegal, he could have challenged them through tra-

ditional administrative and judicial avenues when the actions were taken. Having either failed in or passed on his challenges to the very regulatory actions at issue here through appropriate and timely administrative and judicial means, he cannot now use those actions as the basis for his RICO and *Bivens* claims. See, *e.g.*, *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421 (1966) (applying *res judicata* principles to issues litigated in federal administrative proceedings); accord *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 484-485 n.26 (1982); *University of Tenn.* v. *Elliott*, 478 U.S. 788, 797-798 (1986); see also Part II.A., *infra*.[6]

### E. At A Minimum, Petitioners Did Not Violate Any Clearly Established RICO Right

For the foregoing reasons, petitioners did not violate respondent's rights under RICO. But even if this Court disagrees, petitioners are still entitled to qualified immunity because, at a minimum, they did not violate any *clearly established* rights. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). A right is clearly established only if "in the light of preexisting law the unlawfulness [is] apparent." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (citation omitted). That is, "[t]he relevant, dispositive inquiry in determining whether a right is

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[6] Respondent's allegation that petitioners also violated Wyoming's extortion law adds nothing material to the RICO analysis. As the court of appeals recognized, the Wyoming offense could constitute a predicate act for RICO purposes only to the extent that it encompasses the generic offense of extortion, which is the same offense contained in the Hobbs Act. Pet. App. 24a; see *United States* v. *Nardello*, 393 U.S. 286, 290 (1969) (holding that a state offense cannot qualify as a predicate act unless it is capable of being "generically classified as extortionate"); *Scheidler*, 537 U.S. at 409-410 (same). Thus, for RICO purposes, any differences between the Hobbs Act and Wyoming's extortion statute are irrelevant, and the absence of any wrongful intent or effort by petitioners to seek private gain forecloses any RICO extortion claim. Moreover, given that petitioners acted at all times pursuant to their federal regulatory authority, they could not be charged for a state law extortion offense in any event. See *In re Neagle*, 135 U.S. 1, 75 (1890).

clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier*, 533 U.S. at 202 (emphasis added). Respondent cannot come close to that threshold. No other court has held that land management officials may be held liable under RICO for seeking to obtain a *reciprocal* right-of-way on behalf of the *government*, and, as noted, the one court of appeals to have addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair*, 314 F.3d at 943.

Accordingly, petitioners had no reason to believe that they were violating RICO or any clearly established right against extortion in attempting to obtain a reciprocal easement for the United States through the exercise of their lawful regulatory authority. To the contrary, they were acting consistent with the well established statutory and regulatory guidelines for managing public lands. See pp. 3-4, *supra*.

## II. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' QUALIFIED IMMUNITY DEFENSE TO RESPONDENT'S *BIVENS* CLAIM

### A. The Fifth Amendment, Tucker Act, And APA Preclude A *Bivens* Cause Of Action In This Context

Respondent's *Bivens* claim under the Fifth Amendment is precluded by the availability of judicial review under the APA and the Tucker Act, and by the nature of the Fifth Amendment right itself. At the very least, there are powerful reasons counseling hesitation in fashioning such a remedy. In the nearly 40 years since *Bivens* was decided, there is no precedent permitting a *Bivens* action against individual government employees for a violation of the Fifth Amendment's Just Compensation Clause. Indeed, only one circuit court has even been willing to assume *arguendo* that such an action was available. *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) ("Although we are unaware of any case extend-

ing *Bivens* to the fifth amendment's takings clause, we will assume without deciding that a *Bivens* action is also available under that constitutional provision."). The complete absence of Just Compensation/*Bivens* claims in the last 40 years reflects the reality that the Just Compensation Clause uniquely spells out the need for reimbursement and that Congress provided alternative mechanisms to provide just compensation for nearly 200 years before *Bivens* was decided. There has never been any need for the courts to create a judicial remedy in this context. Moreover, even aside from the mismatch between the Fifth Amendment's just compensation right and the *Bivens* remedy, the availability of APA review precludes respondent's *Bivens* action in its entirety. A *Bivens* remedy is not available to fill perceived gaps in the APA; this Court has reserved the step of inferring a cause of action for circumstances in which it was damages or nothing. Because respondent's novel *Bivens* action is precluded in its entirety, it must be dismissed.

### *I. A* Bivens *action is inconsistent with claims under the Fifth Amendment's Just Compensation Clause*

*Bivens* is fundamentally ill-suited for claims, like respondent's, founded on the Just Compensation Clause of the Fifth Amendment.[7] In *Bivens*, the Court inferred a cause of action against federal officers for money damages for violations of the Fourth Amendment. In doing so, the Court observed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for consequences of its violation." 403 U.S. at 396. Unique among the

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[7] Respondent's complaint grounds his *Bivens* claim in the "Fifth Amendment * * * 'right to exclude others from private property.'" J.A. 78. That right must derive from state law, not the Just Compensation Clause, which simply requires the payment of just compensation as a condition on the lawful acquisition of property by the federal government. As discussed below, however, the Fifth Amendment does not protect against the alleged wrongs in this case.

Bill of Rights, however, the Fifth Amendment's Just Compensation Clause explicitly specifies a payment of money (or its equivalent)—*i.e.*, "just compensation"—as a condition that must be satisfied for a taking of property by the government to be lawful. Accordingly, for over 100 years before a damages remedy was inferred by this Court in *Bivens*, Congress has provided specific mechanisms to effectuate the constitutional guarantee of just compensation. As a general matter, the Tucker Act, 28 U.S.C. 1491, affords a forum for obtaining that compensation. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) ("[T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491."); accord *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). There is no call for supplanting those congressionally sanctioned mechanisms with a judicially created cause of action for damages at this stage.

A damages remedy against *individual* federal officials, moreover, is fundamentally inconsistent with the nature of the Fifth Amendment right to just compensation, which this Court has repeatedly held is a right that is owed by (and can be violated only by) the government itself, not by federal officials in their individual capacity. See, *e.g.*, *Hooe* v. *United States*, 218 U.S. 322, 335-336 (1910) ("The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, * * * to do so by some act of Congress, is not the act of the Government."); *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (same).

That Fifth Amendment claims cannot be brought against individual officials necessarily follows from the fact that the

Fifth Amendment does not prohibit the government from taking property but simply requires the government to pay just compensation if it does. Thus, if the government provides a mechanism for obtaining just compensation for a taking (as the Tucker Act does), the taking does not violate the Fifth Amendment at all. *Williamson County*, 473 U.S. at 194 ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); see *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (purpose of the Fifth Amendment is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). See also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) ("Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone.").

It is clear, therefore, that no *Bivens* action would be appropriate for an *actual* taking of property under the Fifth Amendment. The fact that respondent cannot even allege that any actual property has been taken in this case does not make his novel attempt to import a *Bivens* remedy into the Fifth Amendment's Just Compensation Clause context any more appropriate.

*2. The APA precludes respondent's* Bivens *action in its entirety*

In recent years, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). That restraint corresponds with the Court's "retreat[]" from its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3; see *Alexander* v. *Sandoval*, 532 U.S. 275,

286-287 (2001). The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Malesko*, 534 U.S. at 69 (quoting *Chilicky*, 487 U.S. at 421-422). To the contrary, when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has declined to create additional remedies under *Bivens*. *Chilicky*, 487 U.S. at 423.

Thus, for example, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for certain personnel actions against probationary employees, *id.* at 385 n.28. Similarly, in *Chilicky*, the Court refused to extend *Bivens* to claims involving the denial of social security benefits, where the social security disability claimants had recourse to both administrative and judicial remedies. This Court, finding "special factors counselling hesitation," 487 U.S. at 423, explained that "Congress chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations" and that "[a]t no point did Congress choose to extend to any person the kind of [damage] remedies that [they] seek in this lawsuit," *id.* at 426.

The reasoning of *Bush*, *Chilicky*, and *Malesko* compels the conclusion that the APA's comprehensive scheme for challenging agency action precludes a *Bivens* remedy with respect to agency actions like those at issue here. Indeed, those circuits that have confronted the issue have held that the availability of relief under the APA generally precludes a *Bivens* action for damages. See, *e.g.*, *Sinclair*, 314 F.3d at 940 ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the

Administrative Procedure Act is sufficient to preclude a *Bivens* action."); *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (APA precludes *Bivens* remedy "even when the administrative remedy does not provide complete relief."), cert. denied, 126 S. Ct. 1908 (2006); *Miller* v. *United States Dep't of Agric.*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("[T]he existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action."); *Moore* v. *Glickman*, 113 F.3d 988, 994 (9th Cir. 1997) (*Bivens* action precluded by APA, coupled with "some indication" that Congress meant to confer less than complete relief); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146, 1148 & n.4 (9th Cir. 1991) (*Bivens* remedy against allegedly unconstitutional agency rulemaking precluded by APA right to judicial review), cert. denied, 506 U.S. 816 (1992).

Similarly, in the Section 1983 context, this Court has generally declined to hold that a federal statute is actionable under Section 1983 if the statute may be enforced through a "private judicial remedy" or "even a private administrative remedy." *Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005); see *ibid.* ("[I]n *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue * * * *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated."); *id* at 121-122 (citing cases); see also *id.* at 128-129 (agreeing that Section 1983 did not provide a cause of action to enforce federal rights that were subject to a "*procedural and judicial review scheme resembl[ing] that governing many federal agency decisions*") (Breyer, J., joined by O'Connor, Souter, and Ginsburg, JJ., concurring) (emphasis added). The same principles of separation of powers and judicial restraint that led the Court to that conclusion in the context of Section 1983—an express statutory cause of action—apply with even more force in the context of *Bivens*—an inferred constitutional cause of action.

Although it acknowledged that the APA generally precludes a *Bivens* action arising out of final agency action, Pet. App. 81a, the court of appeals purported to carve up respondent's *Bivens* claim into two separate categories: (1) allegations of final agency action (which the court held had to be pursued under the APA) and (2) allegations it deemed insufficiently related to final agency action (for which, it held, a *Bivens* action was appropriate). *Id.* at 82a. That dichotomy is seriously flawed, both as a matter of law and of fact. As a matter of law, the observation is flawed because *Bivens* is not available as a mere gap-filler to allow an additional cause of action to address administrative actions too premature or too insignificant to merit APA review. See pp. 34-37, *infra*. As a matter of fact, all of the allegations at issue, properly viewed, are related to the same final agency action—the cancellation of the right-of-way granted to respondent's predecessor at the ranch—and to respondent's refusal to grant a reciprocal right-of-way to the government.

Moreover, all of respondent's arguments against the regulatory actions he now alleges as the basis for his RICO and *Bivens* claims were either raised and resolved against him during his administrative challenges to those actions, or could have been raised in those or similar challenges. For example, in the IBLA decision concerning the cancellation of his easement on public lands and his administrative trespass penalty, the Board expressly rejected respondent's contentions that BLM's actions resulted "in an unconstitutional 'taking' of his property" and that BLM acted with improper motives, bad faith, or an intent to "blackmail" him into agreeing to a reciprocal easement. *Frank Robbins*, 146 I.B.L.A. 213, 219 (1998) (finding, among other things, respondent's allegations of "blackmail" and an unconstitutional taking to be "unsupported"). Respondent chose not to seek judicial review of the IBLA's decision.

Similarly, in challenging BLM's proposed cancellation of his grazing permit, respondent expressly argued that BLM's

actions constituted an uncompensated taking under the Fifth Amendment and this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994). The IBLA rejected that claim as being utterly baseless in light of the numerous blatant violations of the terms of those permits, which the IBLA determined were the real and sufficient grounds for the cancellations. C.A. App. 62 (*HD Ranch*, IBLA No. 99-279, slip op. at 5 (May 20, 1999) (order denying petition for stay of cancellation of grazing permit)). Again, Robbins did not seek judicial review of the IBLA's decisions upholding the cancellation of his permits.

Respondent cannot contend, on the one hand, that "*[a]ll*" of the actions alleged in his complaint "were taken as part of an ongoing scheme to coerce [him] to grant the BLM an easement," J.A. 76, and simultaneously maintain, on the other, that certain of those acts (those not leading to final agency action) are unrelated to the final agency actions (the cancelling of his right-of-way and permits) that he claims primarily caused his injuries. That conclusion is further confirmed by the fact that respondent's complaint states only a single *Bivens* claim predicated on an alleged violation of the Fifth Amendment. See J.A. 78-79.

### 3. *None of the limitations of the APA warrant the extension of a* Bivens *remedy in this context*

The fact that the APA provides no remedy for certain agency action—*i.e.*, that involving acts "unrelated to final agency action," Pet. App. 82a—does not mean that a *Bivens* action may be inferred with respect to that conduct. To the contrary, inferring such a *Bivens* action would be inconsistent with Congress's decision to shield non-final agency action from review under the APA. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Given that the major incidents that give rise to respondent's claim involve final agency action, the court of appeals' rule has the perverse con-

sequence of inferring a *constitutional* cause of action for money damages only as to those incidents that Congress considered too premature or insignificant for judicial review under the *statutory* cause of action established by the APA. The APA, rather than personal liability under *Bivens*, establishes what Congress deemed to be the appropriate mechanism for judicial review in this context. Whatever the merit of inferring causes of action when it is damages or nothing, see, *e.g.*, *Malesko*, 534 U.S. at 75 (Scalia, J., concurring), it cannot be justified as a means of perfecting or filling gaps in a comprehensive statutory scheme like the APA.

Similarly, the fact that the APA does not permit an award of damages does not justify extending *Bivens* to this context. 5 U.S.C. 702. The APA provided respondent the opportunity to challenge each of the key regulatory actions that now form the basis of his *Bivens* claim—the cancellation of his easement on government land, the filing of trespass charges against him, and the cancellation of his grazing and special use permits on government land—and to ask a court to reverse or enjoin those regulatory actions, thereby avoiding the very harms he now attempts to claim under *Bivens*. Among other things, the APA permits a court to set aside agency action found to be "contrary to constitutional right." 5 U.S.C. 706(2)(B). Respondent was entitled, therefore, to raise any constitutional challenge he may have had to petitioners' actions in a suit for judicial review under the APA, and he in fact did raise such challenges in administrative proceedings (though he chose not to pursue them in court). See pp. 7-8, 33-34, *supra*. Because the APA provides the opportunity to challenge unlawful adverse agency actions at the outset, and thereby avoid the monetary harm that may otherwise result from those agency actions, it provides a comprehensive reme-

dial scheme that precludes a *Bivens* action, even in the absence of a right to money damages.[8]

Furthermore, when a comprehensive statutory remedial scheme exists, it does not matter whether a particular plaintiff will have any remedy under that scheme. Cf. *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). Indeed, it is settled circuit law that *Bush* and *Chilicky* prevent the creation of a *Bivens* remedy even when the particular plaintiff has *no* relief at all under the comprehensive statutory remedy. See, *e.g.*, *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir. 1991) (holding that where Congress has created a comprehensive remedial scheme, courts may not create additional remedies, "even where a particular litigant does not have a remedy available under the statutory scheme"); accord *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) ("In the field of federal employment, even if no remedy at all has been provided by the [Civil Service Reform Act], courts will not create a *Bivens* remedy.") (citing cases); *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) (same). See also *Volk* v. *Hobson*, 866 F.2d 1398, 1402 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc).

Accordingly, extending *Bivens* to this context would radically expand *Bivens* in direct contravention of this Court's precedents and principles of judicial restraint. See *Malesko*, 534 U.S. at 69. Congress provided an APA remedy by which respondent could have challenged the actions taken by BLM, and it is not the province of this Court to supplant that careful statutory remedial scheme by inferring a markedly different

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[8] The APA remedy also offers a plaintiff something unavailable in a *Bivens* action: the potential for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). Attorney's fees are unavailable in *Bivens* actions. *Kreines* v. *United States*, 33 F.3d 1105 (9th Cir. 1994), cert. denied, 513 U.S. 1148 (1995); cf. *Premachandra* v. *Mitts*, 753 F.2d 635 (8th Cir. 1985) (en banc) (no fees in injunctive action against federal employees for constitutional violations).

constitutional cause of action for money damages against individual officials.

### B. There Is No Fifth Amendment Right Against Retaliation For The Exercise Of Property Rights

Even assuming a *Bivens* action might be inferred under the Just Compensation Clause in certain circumstances, respondent's claim here is without merit, because not only has he failed to show a substantive violation of the Fifth Amendment (as explained below), but the Fifth Amendment does not embody the novel anti-retaliation right conceived of by the court below. Pet. App. 15a. Until the decision below, no court of appeals had ever recognized a constitutional right against retaliation outside the context of activity protected by the First Amendment, much less in the context of property rights protected by the Fifth Amendment's guarantee of just compensation. That unprecedented aspect of the court's decision provides a sufficient reason for reversing the court of appeals' *Bivens* ruling.

This Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of *First* Amendment rights. The Court has long shown a special sensitivity to the exercise of First Amendment rights, see, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 433 (1963) (First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society"); *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute."), and government action retaliating for unwelcome speech can readily be seen as abridging free speech. When someone suffers retaliation for exercising First Amendment rights, the Court has, accordingly, permitted an action for damages to compensate for such retaliation. See *Hartman* v. *Moore*, 126 S. Ct. 1695, 1701 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from

subjecting an individual to retaliatory actions * * * for speaking out.") (citation omitted); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).[9]

Neither this Court nor any circuit court other than the court below has held that other constitutional provisions include an anti-retaliation component. While government retaliation for unwelcome speech can be seen as action abridging free speech, government retaliation—stopping short of a taking—for the exercise of a property right cannot be readily characterized as a taking or Fifth Amendment violation. Indeed, the court of appeals itself did not ground its decision recognizing a newfound Fifth Amendment anti-retaliation right in any particular reading or historical understanding of the Fifth Amendment, but rather in *dictum* in a First Amendment case. Pet. App. 15a-16a (citing *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990), cert. denied, 502 U.S. 814 (1991)).

While the Fifth Amendment is of course entitled to equal footing with the First, the concerns about chilling protected activity that motivate the anti-retaliation doctrine in the First Amendment context are not present, or at least are greatly reduced, in the Fifth Amendment takings context. Unlike the First Amendment, the Fifth Amendment was not intended to encourage a particular type of expressive citizen activity that could be chilled if not robustly protected. Moreover, individuals have an inherent and strong interest in vigorously resisting unwarranted government interference with their prop-

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[9] The Court's recognition of a specialized First Amendment right against retaliation is consistent with the fact that the Court has developed a variety of other legal doctrines that apply in the First Amendment context alone. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003) (overbreadth); *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive alternative); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (prior restraints); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (third-party standing); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000) (independent review of fact finding).

erty, and the Fifth Amendment's guarantee of just compensation for taking of any protected property interest itself creates a robust incentive for invoking one's Fifth Amendment rights.

Furthermore, the Fifth Amendment, which requires the availability of just compensation in order for a taking to be valid, presupposes a degree of permissible governmental interference with property rights that is wholly alien in the context of First Amendment speech rights. Indeed, the scope of permissible government interference is sufficiently broad in the Fifth Amendment context that this Court has made clear that typically no constitutional violation occurs at the time the property in question is taken by the government. Instead, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Williamson County*, 473 U.S. at 195; see *id.* at 194 n.13. Thus, because the Fifth Amendment's Just Compensation Clause (unlike the First Amendment) is not primarily an absolute prohibition of government action, but rather requires the availability of just compensation for any taking that may occur, the anti-retaliation right created for the First Amendment is ill-suited for this markedly different constitutional context.

That conclusion is particularly true in the present context of interlocking properties and reciprocal easements that are common in public land management in the West. In that context, there is a broad scope of legitimate give and take that makes liability for going too far in allegedly "retaliating" for another landowner's failure to agree to a reciprocal easement particularly troubling. The Fifth Amendment provides substantial leeway for such give and take—establishing a prohibition on the government's conduct only when it actually takes property and, even then, only when it does so without provid-

ing just compensation. It is therefore telling that respondent in this case has pointedly declined to allege any taking.

Finally, any practical value of creating a separate Fifth Amendment right against retaliation is severely diminished by the fact that the well-established First Amendment right against retaliation protects citizens seeking to invoke their Fifth Amendment protections by petitioning the government for just compensation or other administrative means of redress. That is because the First Amendment protects the underlying activity of petitioning the government for redress. In this case, however, respondent has never asserted any First Amendment retaliation claim against petitioners. Instead, his claim is grounded exclusively in the state-law right to exclude and the Fifth Amendment's Just Compensation Clause, which lacks any independent anti-retaliation component. See J.A. 78-79.

### C. Respondent Has Not Alleged The Violation Of Any Right Protected By The Fifth Amendment

Respondent does not allege that any of his property rights were actually taken by the government, or that the right to just compensation guaranteed by the Fifth Amendment has otherwise been triggered by any of the regulatory actions about which he complains.[10] Instead, his *Bivens* claim is premised on the theory that the Fifth Amendment's guarantee of just compensation entitles him to enjoy a right-of-way over *public* land (and other rights to public land relating to grazing and commercial recreational activities) while refusing to grant the government a reciprocal easement over his own land. Remarkably, the court of appeals not only accepted respondent's novel theory of the Fifth Amendment, it held that the rights asserted were sufficiently clearly established as to give

[10] Respondent made takings claims in the administrative actions he filed against BLM. The IBLA rejected those claims and respondent did not seek judicial review of that order. See pp. 7-8, 33-34, *supra*.

rise to personal liability for petitioners. That holding is profoundly wrong.

### *1. The Fifth Amendment guarantees only the right to just compensation*

By its terms, respondent's *Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment. Pet. App. 10a-16a. The Fifth Amendment, however, does not by its terms guarantee the right to exclude others from one's property. Rather, it guarantees the availability of just compensation as a condition to the taking of property. That is not to say that the right to exclude is not a protected property interest. It is common ground that individuals possess a "right to exclude" others—including the government—from their property. But although this Court has held that the right to exclude was "[o]ne of the main rights attaching to property" found at common law, see *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978), the Court has made clear that the right's contemporary source is state law, see *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972); see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984). The Fifth Amendment thus protects the state law right to exclude by the same means it protects other state law property rights against action by the government: by the guarantee of just compensation if that right is lawfully "taken" within the meaning of the Just Compensation Clause. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Dolan*, 512 U.S. at 384.[11]

Because the only guarantee of the Fifth Amendment is the availability of just compensation (which is presumptively

---

[11] State law still protects the right to exclude through non-constitutional means, including the tort of trespass. Federal officials who enter private property without the requisite authorization may commit the tort of trespass, and such trespasses may be remedied under the FTCA.

available under the Tucker Act), respondent has no Fifth Amendment right to preclude the government from taking his property (or under his theory, from seeking to coerce him to grant property to the government). Thus, the court of appeals plainly erred when it held that "[respondent] has a Fifth Amendment right to *prevent* BLM from taking his property when BLM is not exercising its eminent domain power." Pet. App. 14a (emphasis added); see *ibid.* ("Under the Takings Clause, the government may take private property for public use so long as it provides just compensation. U.S. Const. amend. V. When the government has chosen not to exercise its eminent domain power, however, citizens remain free to exclude even the government from their private property. *Kaiser*, 444 U.S. at 179-80."). Indeed, this Court has made clear both that an individual has no Fifth Amendment right to *prevent* a taking (only a right to just compensation for the taking), and that takings may occur outside of the formal eminent-domain process.

In *Williamson County*, the Court declared that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Likewise, in *Monsanto*, this Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016 (footnote omitted). As the Court explained, nothing in the Fifth Amendment "require[s] that compensation precede the taking." *Ibid.*; see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985).

In addition, this Court has long held that takings may occur outside of the eminent-domain process. See *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting that the Court has recognized since 1922 "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster

—and that such 'regulatory takings' may be compensable under the Fifth Amendment"). The fact that petitioners were not exercising eminent-domain powers therefore does not elevate respondent's state law right to exclude the government from his land to a guarantee of the Fifth Amendment (as opposed to a state law property right protected by the Fifth Amendment's guarantee of just compensation). And the fact that respondent has not alleged that petitioners actually took his property outside the eminent domain process provides another reason that his claim is outside the ambit of the Fifth Amendment.

Relatedly, a plaintiff may not sue individual government employees for a taking; his sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act once a taking has occurred. See 28 U.S.C. 1491. And if the government eventually provides just compensation for a taking, the taking itself does not violate the Fifth Amendment at all. See pp. 29-30, *supra*.

*Kaiser Aetna*—the principal case on which the court of appeals relied, Pet. App. 12a-14a—is not to the contrary. That decision makes clear—in language omitted by the court of appeals—that the "right to exclude" may be taken so long as just compensation is paid. 444 U.S. at 179-180 ("[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take *without compensation*.") (footnote omitted and emphasis added). Respondent, however, does not claim any taking and thus has never pursued the statutory avenue to obtain compensation for an alleged taking. *Williamson County*, 473 U.S. at 195 ("[T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491."); accord *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Especially in the context of interlocking properties, the careful scheme of the Takings Clause

cannot be replaced by individual officer liability when the negotiation process for a reciprocal easement breaks down.

***2. Respondent cannot claim that petitioners imposed an unconstitutional condition on either his property rights or his right to access public lands***

As indicated, respondent does not allege that any of his property was actually taken, but that BLM tried to take his property by pressuring him to give the government a reciprocal right-of-way over his property. In fact, far from alleging that the government has actually taken any of his property, respondent's Fifth Amendment *Bivens* claim is predicated on his assertions that he is being denied the use of *public* lands (*i.e.*, a right-of-way on and maintenance of the federal portion of the road, and grazing and recreational use privileges on federal lands) because he will not consent to a reciprocal right-of-way over his portion of the road. In this regard, this case is not about the "right to exclude" the government from one's *own* property as much as it is the right to obtain access to *public* land (and benefit from other valuable public privileges such as grazing and special use permits on public lands) while refusing to grant the government any reciprocal rights on private land. Whatever else is true, the Fifth Amendment does not confer upon respondent a right to use public lands for his private benefit while denying BLM the reciprocal right-of-way necessary for BLM to manage and protect interlocking public lands.

Relying, *inter alia*, on this Court's decisions in *Nollan* and *Dolan*, respondent asserts that "[t]he Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights," because "[t]he denial of those benefits had no relationship to the BLM's legitimate regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an 'out-and-out plan of extortion.'" Br. in Opp. 26-27 (citation

omitted). But respondent's reliance on the *Nollan* line of cases is fundamentally misplaced for several reasons.

First, the only regulatory action BLM took that can be fairly characterized as being based on respondent's refusal to grant the United States a reciprocal easement on his land was the cancellation of the right-of-way the government had granted to respondent—which was conditioned on the receipt of the reciprocal easement. But it may not seriously be contended that the conditioning of a right-of-way on public land on the receipt of a reciprocal easement on private land—in the context of a road that passes over interlocking parcels of both public and private lands—constitutes a taking under the Fifth Amendment.

Indeed, seeking to obtain such reciprocal property rights is a reasonable and commonplace feature of federal land management, just as it is for private landowners. Consistent with its statutory responsibilities, BLM has determined that, in certain circumstances, it is appropriate to grant rights-of-way on public lands to business entities, among others, and to "regulate, control and direct" the use of those rights-of-way to "[p]rotect the natural resources associated with the public lands" and to "[p]revent unnecessary or undue environmental damage to the lands and resources." 43 C.F.R. 2800.0-2(a) and (b) (2004). BLM has also determined that it may be consistent with the public interest to condition the grant of a right-of-way over public land on the receipt of a reciprocal "equivalent right-of-way [on the applicant's land] that is adequate in duration and rights." 43 C.F.R. 2801.1-2 (2004). Where, as here, an applicant for a right-of-way refuses to grant BLM a reciprocal easement, his application may be denied without running afoul of the Fifth Amendment. Especially in the context of interlocking parcels of public and private lands, conditioning a right-of-way on public land on the receipt of a reciprocal easement is eminently reasonable and easily satisfies any requirement of an "essential nexus" between a legitimate state interest and the condition of a recip-

rocal easement, *Nollan*, 483 U.S. at 837, or a "rough proportionality" between the terms of the reciprocal easement and the government's objectives, *Dolan*, 512 U.S. at 391.

The reciprocal easement at issue in this case simply represents a logical consequence of the considerations discussed in this Court's decision in *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), which also arose because of the interlocking nature of public and private lands in Wyoming. The dispute in that case arose when the government simply cleared a dirt road over private land so that the public could access a reservoir over a "checkerboard configuration" of lands that made access to the reservoir impossible without crossing private land. *Id.* at 678. The Court in *Leo Sheep* refused "to accommodate some ill-defined power to construct public thoroughfares without compensation" over checkerboard lands in the West to guarantee public access to public lands. *Id.* at 687-688. But at the same time, the Court understood that there remained ready alternatives to either exercising eminent domain or rendering public lands effectively unusable, including "negotiation" and "reciprocity concerns." *Id.* at 681; see *id.* at 686 (Congress believed that "the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads" in the West over interlocking public and private lands). Respondent here now seeks to subject federal officials to the pain of RICO liability and *Bivens* claims for precisely the sort of give and take that both Congress and this Court have recognized has been instrumental to ensuring that public lands are not stranded and rendered inaccessible to the public.

Second, respondent is precluded from claiming in this *Bivens* action that petitioners impermissibly conditioned other regulatory benefits, such as his grazing and special recreation permits, on his granting a reciprocal easement to the government. As found in respondent's administrative challenges to each of the complained-of regulatory actions, petitioners had independent and sufficient regulatory reasons for

each of the actions taken. Respondent—like the land owners in *Nollan* and its progeny—could have sought judicial review of those adverse administrative adjudications and, if he could establish that they were unlawful, could have prevented those actions from occurring. He did not do so. He therefore should not now be able to avoid dismissal of this extraordinary *Bivens* action on the ground of qualified immunity by merely alleging an improper objective as a way of circumventing the customary channels of administrative and judicial proceedings. See, *e.g.*, *Utah Constr.*, 384 U.S. at 421-422 (applying principles of issue and claim preclusion to administrative adjudications); accord *Kremer*, 456 U.S. at 484-485 n.26; *Elliott*, 478 U.S. at 797-798.

Third, in the *Nollan* line of cases, there was an actual interference with property owned by the private citizen. In *Nollan* itself, for example, the property owners were denied a building permit on their land unless they agreed to a public easement. In concluding that the public easement condition lacked an "essential nexus" to any legitimate land-use regulation, the Court expressed particular concern for cases, such as *Nollan* itself, "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." 483 U.S. at 841.

Here, in stark contrast, respondent alleges—at most—that petitioners placed an improper condition on an asserted right to use *public* lands. Respondent claims that he is being denied the use of public lands—namely, the right to conduct maintenance of the federal portion of South Fork, Owl Creek Road and grazing and special-use privileges on federal lands—because he will not consent to a reciprocal right-of-way over his portion of the road. While a property owner is free to argue that conditions on the use of public lands violate his due process or equal protection rights, there is no support for the rule adopted by the court of appeals that the government's

reasonable efforts to secure reciprocal property rights as a condition of access to public lands constitutes a taking under the Fifth Amendment. And such a rule would radically upset settled expectations in numerous areas, including land management in the West, where the government and private parties negotiate mutually beneficial reciprocal arrangements that involve valuable public benefits, including rights-of-way over public lands.

### D. At a Minimum, Petitioners Did Not Violate Any Clearly Established Fifth Amendment Right

Finally, even if this Court were to adopt a theory of constitutional retaliation that for the first time extended to rights under the Fifth Amendment, petitioners in this case still would be entitled to qualified immunity. As we explained above, whether a right is clearly established must be analyzed very specifically in the narrow context presented. That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. That inquiry is conclusively determined in this case by the fact that the court of appeals itself admitted that "no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights." Pet. App. 16a. Nor has any court previously recognized a *Bivens* cause of action in this context. That is the end of the qualified immunity inquiry.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

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JANUARY 2007

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No. 06-219

IN THE

# Supreme Court of the United States

CHARLES WILKIE, ET AL.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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## STATEMENT OF THE CASE

Petitioners in this case, officials of the United States Bureau of Land Management (BLM), engaged in a campaign of harassment and coercion designed to force respondent, a Wyoming rancher, to give the Government a property interest in his land without just compensation. The principal question before the Court is whether that brazen attempt to circumvent both the limitations on petitioners' regulatory authority and the requirements of the Fifth Amendment violated respondent's clearly established rights under the Constitution and state and federal statutes prohibiting extortion under color of official right.

1. Although the BLM is granted substantial responsibilities and powers over the management of *federal* land (Pet Br. 2-3), its power over neighboring *private* property is strictly constrained by the Constitution, legislation and regulation. In particular, the BLM is authorized to acquire access to private property in just four ways.

First, the agency may acquire property through purchase from a willing seller, or by donation or exchange. *See* 43 U.S.C. §1715(a).

Second, the agency may take private property through eminent domain, but "only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose." *Id.* If the BLM determines to exercise this power, it must request the Attorney General to commence a condemnation proceeding in district court and the land owner is entitled to challenge whether the statutory conditions have been met. *See* 40 U.S.C. § 3113; *United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982).

Third, by regulation, the BLM has claimed the authority to require an "applicant for a right-of-way" across federal land "as a condition of receiving a right of way, to grant the United States an equivalent right-of-way that is adequate in

duration and rights." 43 C.F.R. § 2801.1-2 (2004). Under this regulation, the BLM has no authority to demand an easement from a person who is not an "applicant for a right-of-way" – for example, a person whose prior right-of-way has been cancelled.

Fourth, a further regulation provides that a permit for grazing on federal lands "may include . . . [a] statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public land." 43 C.F.R. § 4130.3-2(h). This provision does not authorize the BLM to obtain a property interest – such as an easement or right-of-way – in exchange for a grazing permit; only a right of limited access is allowed. Nor does the provision authorize the BLM to demand access for non-governmental entities or for purposes unrelated to the management or protection of public lands.

2. Respondent Harvey Frank Robbins is the current owner of the High Island Ranch, a cattle and guest ranch located in Hot Springs County, Wyoming. Pet. App. 2a. The ranch stretches for approximately 40 miles, a patchwork of mostly contiguous parcels of land, occasionally interspersed with property owned by other individuals, the State of Wyoming, or the federal government. *See* J.A. 136 (Map). The western portion of the ranch extends up the slope of a mountain range, eventually reaching the border of the Shoshone National Forest near the origination of the Rock Creek. The upper Rock Creek area contains both great natural beauty (admired by hikers and environmentalists) and possible mineral resources (valuable to private land owners and mining companies). C.A. Supp. App.[1] at 561, 577-78, 600-06. Although the area is accessible from the north and south, environmental groups and recreational users have long

[1] "C.A. Supp. App." refers to the Tenth Circuit supplemental appendix, containing respondent's summary judgment evidence.

desired improved access to the area. J.A. 136; C.A. Supp. App. 590-93, 605-06. In the late 1980s, federal officials from the BLM and the U.S. Forest Service began meeting with officials of the Wyoming Game and Fish Department in an attempt to satisfy that public demand. C.A. Supp. App. 575-89, 594-96, 598-604. Their efforts soon came to focus on obtaining public access to the South Fork Owl Creek Road, which runs through the High Island Ranch. *Id.* The difficulty was that neither the State nor the Federal Government owned the road as it passed through the Ranch or had any legal authority to demand that the public be allowed to use it.

In early meetings, the Forest Service recommended to the BLM that it negotiate with the then owner of the Ranch, George Nelson, to purchase a public easement from him. C.A. Supp. App. 575-78, 600-02. In response to mounting public and political pressure, petitioner Joseph Vessels, then Area Manager for the local BLM office, contacted Nelson several times in 1993, seeking a public easement across the Ranch. C.A. Supp. App. 607-15. Rather than offering to purchase the easement, as suggested by the Forest Service, Vessels offered that in exchange for the easement, the BLM would allow Nelson to maintain a portion of the road as it ran across BLM land. *Id.* at 609-12. Nelson already had a right to use the road to access his property but needed BLM permission to use the road for commercial purposes or to maintain it, and the road had fallen into serious disrepair, *id.* at 794. Nelson took the offer under consideration.

While Nelson was reviewing the offer, Vessels reported to various constituencies that he was in the process of securing public access. C.A. Supp. App. 616. Nelson subsequently informed Vessels that he would agree to give the BLM an easement, but would not agree to allow public access, as it would interfere with the operation of his guest ranch, which offered customers the opportunity to participate in authentic, traditional cattle drives across lands uninterrupted by the traffic and intrusion of modern life. *Id.*

at 613-15. Vessels agreed to that condition and prepared the documents. J.A. 94-96.

Although existing regulations permitted the BLM to require an "equivalent" easement from Nelson in exchange for a right-of-way across BLM land, 42 C.F.R. § 2801.01-2 (2004), the easement and right-of-way Vessels prepared were markedly unequal. J.A. 90-93, 97-103. The easement to the BLM was a recordable, irrevocable, twenty-year easement allowing the BLM and its licensees "full use" of the road, subject only to certain restrictions related to oil and gas development. *Id.* at 90-91. In contrast, the right-of-way provided to Nelson required him to pay the BLM "fair market value rental" and restricted Nelson's use and maintenance of the road to certain times of the year. *Id.* at 99. And while the easement allowed the BLM to permit mining companies to use the road to access federal land, the right-of-way did not permit Nelson to use the federal portions of the road for that same purpose. *Id.* at 102. Nelson nonetheless signed the easement on March 18, 1994. J.A. 92-93. However, for reasons undisclosed in the record, the BLM failed to record the easement. Pet. App. 2a.

While Nelson was negotiating to obtain the right-of-way, he was also looking to sell the Ranch. Although the Wyoming Game and Fish Department had hoped to acquire the property, J.A. 44,[2] Nelson eventually agreed to sell the Ranch to respondent, executing a sales contract on March 6, 1994. C.A. Supp. App. 569-73. It is uncontested that respondent was unaware of the BLM's easement when he completed the purchase and recorded his warranty deed, thereby extinguishing the unrecorded easement. Pet. App. 2a.

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[2] J.A. 44 is respondent's Third Amended Complaint. *See also* Pet. App. 37a (district court finding that "Robbins has provided ample [summary judgment] evidence to support the allegations in his third amended complaint").

Petitioners soon discovered their mistake. Not only had the plan to purchase the Ranch for public use been frustrated by the sale to respondent, but petitioners' limited success in obtaining at least some access across the Ranch had been lost through their failure to record the easement. Vessels immediately contacted respondent, still living in Alabama. He demanded that respondent sign a new easement, telling him "this is what you are going to do" and "you don't have any choice." C.A. Supp. App. 325-26. Respondent said he would be happy to negotiate a deal once he moved to Wyoming but was unwilling to capitulate to unilateral demands. *Id.* Petitioner Vessels informed respondent that "the Federal Government does not negotiate." *Id.*[3]

Respondent's refusal to grant the easement infuriated petitioners. One of their BLM coworkers, Edward Parodi, later testified that BLM employees were soon referring to respondent as that "the rich SOB from Alabama [who] got" the property. He also testified that officials were "quite upset," predicting that "this was going to be one heck of a fight." J.A. 121-22.

Respondent nonetheless refused to capitulate. He had purchased the Ranch free and clear, unaware of any easement attaching to the Ranch (which obviously would have affected its value) precisely because petitioners failed to afford him notice by recording the easement. J.A. 45. Respondent was not an "applicant for a right-of-way" who could be required by the BLM to provide an easement "as a condition of

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[3] Vessels also demanded that respondent permit the BLM to conduct a survey across his property to ascertain the scope of the easement. J.A. 47. Respondent refused, reasoning that there was no point in allowing a survey until he determined whether he would grant the easement. C.A. Supp. App. 326. Vessels ordered that the survey be conducted anyway, trespassing on respondent's property and later boasting that he had conducted the survey despite respondent's protest. *Id.*

receiving a right-of-way," 43 C.F.R. § 2801.1-2 (2004), since it was Nelson, and not respondent, who had applied for the right-of-way from petitioners. And nothing in the regulations or the Nelson right-of-way agreement required respondent to grant the BLM a new easement whenever the prior easement expired through no fault of his. J.A. 97-103.

Petitioners nonetheless persisted in asserting that respondent was obliged to execute a new easement, and respondent continued to refuse. Parodi testified that as time went on, petitioners became increasingly hostile toward respondent. *Id.* at 122-27. As a result, Parodi explained, petitioners soon settled on a scheme to "get . . . [respondent's] permits and get him out of business." *Id.* at 125-26.

One of petitioners' first steps was to cancel respondent's right-of-way across BLM land in July 1995. C.A. App. 40-43.[4] Although the cancellation was harmful, petitioner found ways to continue to operate his Ranch without it. After the right-of-way was cancelled, petitioners had no plausible argument that respondent had a legal duty to give the BLM an easement in exchange for a right-of-way that he no longer had. Nor could they rely on his grazing permits to demand an easement, as these permits allowed the BLM only "administrative access," not a property interest like an easement. 43 C.F.R. § 4130.3-2. Petitioners nonetheless continued to demand that respondent give them an easement and, when he refused, undertook a campaign of harassment and intimidation to punish him and coerce him into acceding to their demands:

***False Criminal Charges.*** In a 1997 meeting, petitioner Barnes repeated his demand that respondent give the BLM an easement. J.A. 56. When respondent refused, Barnes immediately summoned petitioner Miller, a BLM law enforcement officer, who proceeded to interrogate respondent

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[4] "C.A. App." refers to the appendix to the appellant's brief in the Tenth Circuit.

and accuse him of the crime of interfering with a federal employee in a prior incident. *Id.* at 348-49, 499-500, 850-53. Based on petitioners' allegations, respondent was charged with violating 18 U.S.C. § 111. *See United States v. Robbins*, 179 F.3d 1268, 1269 (10th Cir. 1999). Having endured the expense and humiliation of a public criminal prosecution, respondent was acquitted by a jury after less than one-half hour of deliberations. *Id.* After the verdict, "jurors stated that they were appalled at the actions of the government." C.A. Supp. App. 852.[5]

***Harassment.*** Petitioners also interfered with the operation of the Ranch. For example, petitioners would closely follow the guest cattle drives in BLM vehicles and openly videotape them, ruining the guests' authentic cattle drive experience. J.A. 52; C.A. Supp. App. 331, 424-25, 504-05. On one occasion, petitioners Barnes, Miller and Vessels trespassed on respondent's property and parked a BLM vehicle in the path of the cattle drive, then proceeded to videotape respondent's guests from a hilltop, even as they sought privacy to go to the bathroom. *Id.* at 505-08. That same day, petitioners broke into his upper guest ranch lodge, leaving it in disarray. *Id.* at 314-20; J.A. 52.

***False Administrative Charges And Selective Enforcement of Regulations.*** Prior to his purchase of the

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[5] Respondent applied for attorney's fees under the "Hyde Amendment," which required him to prove that the "position of the United States was vexatious, frivolous, or in bad faith." Pub. L. 105-119, 111 Stat. 2440, 2519 (1997). The district court declined to decide whether there was probable cause for the prosecution, but held that respondent had failed to make the required showing. *United States v. Robbins*, No. 97-CR-0092-B, slip op. 9-13 (D. Wyo. Apr. 8, 1998). Notably, the court did not pass on whether *petitioners'* allegations, which instigated the prosecution, were frivolous or in bad faith. *Id.* (deciding only whether the position of the United States, as prosecutor, was baseless, vexatious or in bad faith).

High Island Ranch, respondent owned a similar ranch in Montana that was also interspersed among federal lands. *Id.* at 324, 456-58. During the ten years he owned the property, respondent maintained an exemplary record with the Montana BLM office, *id.* at 324, a record he replicated with respect to the grazing permits issued by the Forest Service in Wyoming, *id.* at 499.

Upon his refusal of petitioners' demand for an easement, respondent's record with the Wyoming BLM promptly assumed a different hue. Petitioners engaged in a prolonged campaign of false administrative charges and selective enforcement of agency regulations in an attempt to build a case for revoking the grazing and special recreational use permits upon which respondent depended to make economic use of his property. J.A. 72-73. Parodi thus testified that petitioners instructed him to "look closer" and "investigate harder" in an effort to catch respondent in grazing permit violations, and that "if I could find anything, to find it." J.A. 127-29, 134.

While Parodi was reluctant to follow this directive, petitioners were not. For example, petitioners charged respondent with trespass for maintaining a BLM road leading to his property after the BLM had failed to maintain it in usable condition, even though they had allowed the prior owned of the Ranch to do the same thing without penalty. *Id.* at 328-29, 794-802. Petitioners also knowingly issued numerous livestock trespass citations against respondent but not against his neighbors for identical conduct. J.A. 50. For example, in 1998, respondent's and a neighboring rancher's bulls tore down a common fence during a fight, allowing livestock from each range to cross briefly into the adjacent property. C.A. Supp. App. 383-85, 418, 911-924. Well aware of these circumstances, petitioners nonetheless issued trespass decisions against respondent but not his neighbor. *Id.* In fact, from respondent's purchase of the Ranch in 1994 through 2003, petitioner Barnes issued a total of 158 grazing

trespass notices to ranchers throughout the district but rendered final decisions sanctioning the trespass only thirteen times — all against respondent. *Id.* at 1563-69. Furthermore, petitioners frequently charged respondent with "willful" trespass – a charge carrying more substantial penalties and possible collateral consequences than the ordinary charge of "nonwillful" trespass appropriate when cattle simply wander onto federal land, *see* 43 C.F.R. §§ 4150.3, 4170.1-1 – even when they knew the violation was accidental or caused by a third party. J.A. 49-50.

Respondent initially attempted to challenge many of the false or selective charges through the BLM administrative process. But the cost of defending against the charges necessarily exceeded the fines involved by orders of magnitude,[6] the appeals took years to resolve,[7] and petitioners interfered with his attempts to defend himself in those proceedings.[8] Moreover, the Interior Board of Land Appeals (IBLA) – the body responsible for hearing land management

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[6] By 2002, Robbins had been assessed a total of $12,620 in penalties, C.A. Supp. App. 1564-69, but had spent hundreds of thousands of dollars in costs and attorney's fees attempting to defeat the charges.

[7] For example, some of the first appealable trespass decisions were issued in 1997, C.A. Supp. App. 1565, but were not subject to a hearing until 2001, and a decision was not issued by the administrative law judge until 2006. *See* Decision, *Robbins v. BLM*, WY-01-98-1 (July 24, 2006).

[8] When, for example, Robbins attempted to obtain information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to prepare for a hearing, petitioner Barnes refused to produce the documents within the time permitted by the Act, providing them instead on the first day of the hearing. C.A. Supp. App. 1174-87, 1201. Although the production mooted Robbins' pending FOIA suit, the district court characterized the BLM's conduct as "arrogance of authority," "troubling," and reflecting "indifference to citizens' legitimate interests." *Id.* at 1204.

appeals from BLM decisions, 43 C.F.R. § 4.1(b)(3) – ultimately held that it lacked jurisdiction to hear respondent's claim that petitioners' regulatory actions were part of an unconstitutional pattern of extortionate harassment. *Frank Robbins*, 170 I.B.L.A. 219, 227 (2006). The escalating cost and lack of any adequate remedy eventually led respondent to abandon attempts to seek administrative relief.[9]

Starting in 1995, petitioners Wilkie and Leone also began a campaign to limit, and then eventually revoke, respondent's right to cross BLM lands during his guest cattle drives, by falsely accusing him of violating the terms of his special recreation use permit ("SRUP"). Tellingly, when petitioner Leone – who was responsible for issuing reports on respondent's compliance with the SRUP terms – retired in 1999, the reported violations immediately ceased. *Compare* C.A. Supp. App. 684-685, *with id.* at 985. Based on Leone's replacement's positive SRUP evaluation, petitioners Wilkie and Barnes initially informed respondent that his SRUP was in "good standing" and should be renewed. *Id.* at 986. But a few months later – one week before respondent's guest cattle drives were scheduled to start, *id.* at 352 – Barnes issued a decision denying the SRUP. The denial was based not upon respondent's record of compliance with the SRUP conditions, but rather upon the accumulated grazing and other charges issued by petitioners. *Id.* at 987-89.

***Attempted Incitement Of Others To Take Adverse Actions.*** Not content with petitioners' own efforts at coercion and retaliation, petitioner Wallace contacted Preston Smith, a manager for the Bureau of Indian Affairs ("BIA").[10] *Id.* at 358-59. Smith testified that Wallace "put a lot of pressure"

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[9] The BLM ultimately revoked respondent's grazing permits because of the repeated trespass charges petitioners filed against him over the years. J.A. 51-52, 57.

[10] Respondent owns and grazes private land adjacent to the Wind River Indian Reservation.

on him to impound respondent's cattle, asserting that he was "a bad character" and that "something needs to be done" with him. *Id.* at 359. Smith rejected the request, explaining that the BIA had no problems with respondent. *Id.*

3. After enduring many years of such abuse and finding his livestock and guest ranching businesses seriously damaged by petitioners' harassment, respondent sued them in their individual capacities. Among other things, respondent sought relief pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his Fifth Amendment property rights. Pet. App. 1a-2a. He further alleged that petitioners had engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.[11]

The district court initially granted petitioners' motion to dismiss on the grounds that respondent had failed to plead sufficiently specific damages under RICO, and that his *Bivens* claim was precluded by the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706, and the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. *Id.* at 3a. On appeal, the Tenth Circuit reversed, holding that respondent adequately pled RICO damages, *id.* at 79a-80a, and rejecting petitioners' claim that the FTCA precluded respondent's *Bivens* claim, *id.* at 83a-84a. As for the APA, the court noted that the Act "contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action." *Id.* at 81a-82a. The court held that "several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim." *Id.* at 82a.

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[11] Respondent also made claims, not at issue here, under the Fourth Amendment and the Due Process Clause. Pet. App. 3a-4a.

On remand, petitioners did not ask the district court to decide which of respondent's allegations on the Fifth Amendment count were precluded by the APA under the Tenth Circuit's standard, *id.* at 26a, but simply moved to dismiss on qualified immunity grounds, *id.* at 55a. The district court denied the motion in relevant part, holding that the complaint adequately pled violations of clearly established rights under RICO and the Fifth Amendment *Id.* at 61a-62a, 72a-74a. Petitioners did not appeal. Instead, after extensive discovery, they moved for summary judgment, re-asserting their defense of qualified immunity. *Id.* at 33a. The district court denied the motion, concluding that respondent had amply substantiated the allegations in his complaint. *Id.* at 37a. Faced with the same facts as it had assumed in ruling on the motion to dismiss, the district court held that its earlier legal determination – that the rights violated were "clearly established" – was law of the case and denied the motion for summary judgment. *Id.* at 34a-36a.

4. Petitioners appealed again, and the Tenth Circuit affirmed. *Id.* at 26a. The court first held that respondent had a clearly established Fifth Amendment right to exclude the government from his private property. *Id.* at 12a. The court then concluded that "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. "Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power." *Id.* at 14a. The court further concluded that petitioners' actions violated that clearly-established constitutional right: "If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government and government officials will be more inclined to obtain private property by means outside the Takings Clause. The

constitutional right to just compensation, in turn, would become meaningless." *Id.* at 14a-15a.

The court also rejected petitioners' assertion of qualified immunity from respondent's RICO claims. The court noted that petitioners had not contested that respondent "sufficiently alleged [they had] engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402." *Id.* at 17a. Instead, they argued that, "[b]ecause [they] had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, . . . their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law." *Id.* The court rejected that assertion, holding that even if petitioners had a general legal right to require respondent to provide an easement in exchange for his right-of-way across federal land, they could not achieve that lawful end through the unlawful means of extortion. *Id.* at 18a-20a. The court then rejected petitioners' claim that their actions were not extortionate, but were simply aggressive exercise of their regulatory duties. That claim, the court held, depended on disputed questions of fact that could not be resolved on summary judgment. *Id.* at 21a. The court also held that petitioners' conduct independently violated Wyoming's extortion statute. *Id.* at 22a-25a.

Finally, the court rejected petitioners' argument that the APA precluded respondent's *Bivens* claim. The court reiterated its holding from the first appeal that the APA precluded respondent's Fifth Amendment claim only to the extent it was based on "individual action leading to a final agency decision." *Id.* at 25a. The court then declined petitioners' request that it "determine which allegations remain and which are precluded," explaining that petitioners "did not raise this issue in their motion for summary judgment." *Id.* at 25a-26a.

## SUMMARY OF ARGUMENT

Petitioners wanted an easement across respondent's land for the BLM and its assigns. When he would not give it to them, they cancelled his right-of-way across surrounding federal property, thereby extinguishing the only plausible basis they ever had for thinking respondent was required to give the Government the easement they were demanding. When that tactic did not work, petitioners began a multi-pronged campaign of harassment aimed at coercing him into handing over the easement and punishing him for insisting on his right to be compensated for giving the Government a property right in his land. That campaign – involving the abuse of petitioners' regulatory authority, as well as other independently unlawful conduct – violated respondents' clearly established rights under the Fifth Amendment and the Racketeer Influenced and Corrupt Organizations Act (RICO).

**I.** Respondent's principal submission is that the Fifth Amendment forbids government action to acquire private property coercively without just compensation, including action to penalize those who insist on their Fifth Amendment rights. Making the remarkable suggestion that penalizing those who insist on their federal constitutional rights offends the Constitution only if the rights thereby penalized find their roots in the Free Speech and Petition Clauses of the First Amendment, petitioners systematically overlook precedents applying an anti-retaliation principle to a wide array of constitutional provisions, ranging from the Fifth Amendment privilege against self-incrimination, to the Sixth Amendment right to a criminal jury trial, to the Due Process right to appeal a criminal sentence, to the right to travel. Far from being arbitrarily excluded from this protection, the Fifth Amendment right to refuse to relinquish one's property has been protected from retaliation with special vigor through the doctrine of "unconstitutional conditions" even when the retaliation has taken only the form of withholding certain "discretionary benefits," much less the form of abrogating

elementary rights to be free of false criminal and regulatory accusations, illegal trespass on one's land, and ongoing harassment of one's business and its customers.

Petitioners seek to avoid the force of the Fifth Amendment by insisting that its only office is to guarantee just compensation when government completes a legislatively authorized taking. But the guarantee of just compensation would be meaningless if it did not include a right to prevent the government from obtaining one's property by pressuring one to waive the right to such compensation. Thus, the fact that a property owner subjected to a classic taking may seek relief only through a Tucker Act suit for just compensation has never prevented this Court from enforcing the Takings Clause in other contexts through adjudications that did not require the property owner to endure the taking and seek only post-hoc compensation.

Indeed, where, as here, executive officials have no legislative authority to take property, the Tucker Act holds no possibility of just compensation at the end of the day, even if the victim of official harassment succumbs and gives over his property to the Government. Not only would the Government undoubtedly deny that there had been any taking (as the property was, on the face of things, freely given) but there would be no compensation even if the victim could prove that the exchange had been coerced, for it has long been established that the taking of property by government officials without legislative authority is not compensable under the Tucker Act or Takings Clause. The *only* remedy against officials who defy not only the Constitution but the legislative restrictions on their authority is a damages suit against those officials. That remedy is available even to those who successfully resist the coercion but suffer damage from the attempt.

**II.** Petitioners insist otherwise, arguing that in fact a *Bivens* remedy is never available to remedy Fifth Amendment violations of this or any other kind.

That argument is outside the scope of this interlocutory appeal. Whether petitioners' conduct violated clearly established Fifth Amendment rights, and what remedy should follow if it did, are two entirely distinct questions; only the first falls within the collateral order doctrine. Moreover, petitioners already had their claim fully adjudicated in a prior appeal, from which they sought no review in this Court. An appeal raising a previously rejected question of law is foredoomed by the law of the case doctrine and does not qualify as one of the "small class" of cases too important to be denied immediate review.

In any event, nothing in the Fifth Amendment, Tucker Act, or Administrative Procedure Act precludes respondent from using a *Bivens* action to obtain the only relief available for his constitutional injuries. While the Tucker Act may provide a statutory means for vindicating "classic takings" claims, it provides no remedy for the injuries inflicted by petitioners' attempts to evade the ordinary process for taking private property. And nothing in the APA reflects a congressional determination that the default procedures and limited recourse of that statute should – even when completely inapplicable because the defendant's conduct is unrelated to any agency action – leave the victim of serious constitutional violations without any remedy at all.

**III.** This Court must also deny petitioners' assertion that they are entitled to qualified immunity against respondent's RICO claim. As an initial matter, the qualified immunity defense to suit, developed for suits under § 1983 and *Bivens*, should not be extended to civil RICO claims. No such defense was available at common law in suits to recover extorted payments against public officials and there is no sufficient policy reason to create one now for civil liability that accrues only when an official is already subject to criminal sanction, and is protected from both unless willful misconduct is proven.

In any case, petitioners' conduct – seeking to obtain a property interest from respondent, through the use of their official powers – plainly constitutes attempted extortion under the Hobbs Act and the state blackmail statute. Petitioners' conduct was "authorized" only in the sense that it involved the use of authorized regulatory powers, turned to an unlawful purpose, as in nearly every case of extortion under color of official right. That petitioners sought the easement for their employer rather than for themselves is no more a defense for a government official than it is for a private employee, a member of a union, or a low-level mobster. The focus of the offense is on the injury to the victim, not the identity of the beneficiary. The Act's requirement of "wrongful" conduct and willful intent are sufficient to protect the interest against undue interference with governmental activities. The Court need not invent what is in effect an absolute immunity for governmental extortion.

## ARGUMENT

### I. THIS CASE INVOLVES NOT "OVERZEALOUS" REGULATORY ACTION BUT AN ATTEMPT BY GOVERNMENT OFFICIALS TO CIRCUMVENT THE LIMITS OF THEIR OWN AUTHORITY AND THE REQUIREMENTS OF THE FIFTH AMENDMENT.

At the outset, it is necessary to correct petitioners' pervasive misrepresentations about the facts of this case.

#### A. Petitioners Had No Authority To Use Their Regulatory Power To Coerce Respondent Into Giving The Government An Easement Without Just Compensation.

Petitioners premise much of their argument on the assertion that they have been sued for simply doing their job, which includes "taking tough regulatory actions [and] driving hard bargains . . . on behalf of the government." Pet. Br. 18.

They imply throughout that they had congressional and regulatory authority not only to acquire an easement across respondent's property, but also to achieve that end through the various oppressive acts that form the basis of this suit. That is not so. Although the Tenth Circuit assumed that "regulatory authority may exist" for "each of [petitioners'] actions," Pet. App. 17a-18a, the court did not assume, and could not have found, that the relevant statutes and regulations permitted petitioners to *use* their regulatory authority in the way they did, for the purpose of extracting an easement without paying for it.

Nothing in the "reciprocal grants" regulation authorized petitioners' conduct. That provision allows the BLM to require an "applicant for a right-of-way . . . as a condition of receiving a right-of-way, to grant the United States an equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. § 2801.1-2 (2004). Set aside that the regulation plainly did not authorize petitioners to demand a rent-free easement for the BLM and its assigns in exchange for having given respondent's predecessor-in-interest a limited right-of-way requiring rental payments and precluding assignment. Set aside further that respondent himself was never an "applicant for a right-of-way," having obtained the right-of-way from Nelson, who had inarguably complied with the condition that he grant the government an easement. Even ignoring those problems, petitioners simply have no argument that this regulation required respondent to give the BLM an easement after they had cancelled his right-of-way in 1995. Having foregone the *quo*, he owed the BLM no *quid*. Petitioners' subsequent actions can in no way be seen as authorized efforts to recover an easement the BLM was owed.

Moreover, even if respondent had owed the BLM an easement, petitioners cannot seriously contend that the regulation gave them authority to recover that property interest through any means other than cancellation of the right-of-way. At the very least, nothing authorized petitioners

to pursue an easement by filing false criminal charges against respondent, trespassing on his property, breaking into his lodge, harassing his guests, issuing false administrative charges, selectively enforcing grazing regulations, and the like. Indeed, many of these acts were independently unlawful.

The court of appeals' decision, therefore, must be read as assuming nothing more than that petitioners used the authority granted by the regulations for purposes the regulations did not permit.

### B. Petitioners' Attempts To Deny The Factual Basis Of The Decision Below Must Be Rejected.

Unable to argue that their conduct was actually authorized, petitioners resort to simply asserting that the allegations against them are untrue. *See* Pet. Br. 24 (claiming petitioners did not trespass); *id.* 25 (claiming they did not "cause false criminal charges to be filed against" respondent); *id.* (asserting they did not cancel right-of-way, grazing permits, or special use permit "to coerce respondent into granting the government a reciprocal easement"); *id.* at 45 ("[T]he only regulatory action BLM took that can be fairly characterized as being based on respondent's refusal to grant the United States a reciprocal easement on his land was the cancellation of the right-of-way the government had granted to respondent."). Those factual assertions were rejected by the district court, which found that the summary judgment evidence substantiated respondent's allegations. *See* Pet. App. 12a, 38a-39a. Right or wrong, that conclusion is not subject to review in this interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

Even if petitioners could evade this jurisdictional limit by framing their factual defenses in terms of the preclusive effect of various administrative proceedings and the denial of attorney's fees in the criminal case, see Pet. Br. 24-26, it would do them no good. Having failed to raise preclusion as

a defense in their answer, they have waived that defense. *See* Answer to Second Amendment Complaint ¶¶ 182-183 (affirmative defenses); *Arizona v. California*, 530 U.S. 392, 410 (2000); *Blonder-Tongue Laboratories, Inc. v. Univ. Of Ill. Found.*, 402 U.S. 313, 350 (1971). Nor would the administrative proceedings have preclusive effect in any event: the IBLA has specifically disavowed any jurisdiction to consider claims of unconstitutional conduct, or to inquire whether administrative action was undertaken for a coercive or retaliatory purpose. *See H. Frank Robbins*, 170 I.B.L.A. 219, 227 (2006); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979).[12] At the same time, the denial of attorney's fees for the criminal case establishes, at most, that the *prosecutors* did not act in bad faith; it does nothing to preclude respondent's claim that *petitioners* engaged in a wrongful abuse of their official powers in bringing the false charges to the prosecutors in the first place.

Finally, petitioners dispute respondent's allegations of retaliatory trespass by asserting that they were, in every instance, simply exercising their right of "administrative access" included as a condition in respondent's grazing permits. Pet. Br. 24. But the permits and regulations allow such access only "for the orderly management and protection of the public lands." 43 C.F.R. § 4130.3-2(h). The district court found that the summary judgment evidence substantiated respondent's claim in his complaint that the

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[12] Thus, the IBLA's passing statement in *H. Frank Robbins*, 146 I.B.L.A. 213, 219 (1998), that respondent had not documented any instances of unconstitutional "blackmail" by petitioners could have no preclusive effect – the constitutional question was beyond the Board's jurisdiction to consider and the statement was entirely unnecessary to the Board's decision (which was limited to the question of whether respondent had violated a regulation by maintaining without permission a BLM road near his property).

incursions on his land were undertaken for an entirely different, and unlawful, purpose: to coerce and retaliate. Pet. App. 30a, 37a-38a. That finding is not subject to review on interlocutory appeal. *Johnson*, 515 U.S. at 313.

Accordingly, this case has nothing to do with "the sort of give and take that both Congress and this Court" have approved in the public lands context, Pet. Br. 46, and everything to do with the kinds of abuse of power the Fifth Amendment and the Hobbs Act were enacted to redress.

## II. THE FIFTH AMENDMENT PROHIBITS OFFICIAL ATTEMPTS TO PUNISH THOSE WHO INSIST UPON THEIR FIFTH AMENDMENT RIGHTS AND TO COMPEL THE RELINQUISHMENT OF PRIVATE PROPERTY WITHOUT PAYING JUST COMPENSATION.

Properly understood, this case thus presents a simple constitutional question: can government officials avoid the Fifth Amendment's prohibition against taking property without just compensation by using their regulatory powers to harass, punish, and coerce a private citizen into giving the Government his property without payment? The answer to that question is a resounding, and clearly established, "No."

### A. The Right Against Retaliation For Exercise Of Constitutional Rights, Including The Right To Just Compensation, Is Clearly Established.

Petitioners do not dispute that their conduct would violate respondent's clearly established constitutional rights if it had been directed at punishing him for exercising a First Amendment right. The sole basis of their defense is their assertion that "the Fifth Amendment does not embody [any] anti-retaliation right." Pet. Br. 37. Indeed, petitioners go even further, asserting that "[u]ntil the decision below, no court of appeals had ever recognized a constitutional right against retaliation outside the context of activity protected by

the First Amendment." *Id.* These remarkable claims are, unsurprisingly, false.

It is a canard that the only federal rights shielded from retaliation in our constitutional canon have been the rights of free speech and peaceful petition for redress of grievances. While the right against retaliation has arisen most frequently in the First Amendment context, this Court has never held that to be the only area in which the people may exercise their constitutional rights free from retaliation. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – *especially*, his interest in freedom of speech") (emphasis added). Part and parcel of what it *means* to have a constitutional right is that the Constitution forbids punishment for its exercise.

Thus, it is elementary that, "[w]hatever may be said of [the Government's] objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *United States v. Jackson*, 390 U.S. 570, 581-82 (1968); *see also Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999) (same); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ."). This Court has applied that principle to hold unconstitutional measures penalizing not only the exercise of First Amendment rights (such as the right to free speech,[13] freedom of association,[14] and free exercise of

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[13] *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75, 686 (1996); *Rankin v. McPherson*, 483 U.S. 378, 383-84, 392 (1987); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 601-02 (1967); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

[14] *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 716-20 (1996); *Branti v. Finkel*, 445 U.S. 507, 515-20 (1980); *Elrod v.*

religion[15]), but also assertions of the Fifth Amendment privilege against self-incrimination,[16] insistence on the right to trial by jury,[17] appealing a criminal sentence,[18] and exercising the right to travel.[19] Although the specific application of the principle, and the applicable legal tests, may vary from context to context, in every case this Court has enforced the basic imperative that government officials may not inflict unwarranted hardship on those who exercise constitutional rights, lest the Government be permitted to do indirectly what it is forbidden from accomplishing directly.

Fifth Amendment property rights are "as much a part of the Bill of Rights as the First Amendment" and should not be "relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). In fact, it is in the Fifth Amendment context that this Court has applied with special vigor "the well-settled doctrine of 'unconstitutional conditions,'" *id.* 385, under which the government "may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in

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*Burns*, 427 U.S. 347 (1976); *Wieman v. Updegraff*, 344 U.S. 183, 190-92 (1952).

[15] *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-06 (1963).

[16] *Lefkowitz v. Turley*, 414 U.S. 70, 82-84 (1973); *Brooks v. Tennessee*, 406 U.S. 605, 610-12 (1972); *Griffin v. California*, 380 U.S. 609, 613-15 (1965).

[17] *Jackson*, 390 U.S. at 581-83; *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

[18] *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).

[19] *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254-62, 260-70 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.*; *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836-37 (1987). In this case, petitioners demanded that respondent give up his right to just compensation in exchange not simply for a "discretionary benefit," like a grazing and special use permit, but also as a condition of enjoying his incontestable *entitlement* to conduct his business free from the scourge of false criminal and regulatory accusations, illegal trespass on his land, and continued harassment of his business and its customers.[20] Here, as in *Nollan*, petitioners were "simply trying to obtain an easement through gimmickry, which convert[s] a valid regulation of land use into 'an out-and-out plan of extortion.'" *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 837).

### B. The Fifth Amendment Proscribes Petitioners' Attempts To Circumvent The Just Compensation Clause.

Petitioners' conduct served not simply to punish respondent for asserting his Fifth Amendment rights, but also to coerce him into waiving them. As the court of appeals rightly held, the Fifth Amendment does not permit

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[20] They assert, instead, that *Nollan* is inapplicable because here the right conditioned was not the right to use one's own property, but the right to access federal land. Pet. Br. 47. Given the commingling of private and federal land in the west, denying the "privilege" of access to federal land often results in the effective denial of access to, or economic use of, one's own private property. At any rate, *Nollan* was simply a particular application of the broader unconstitutional conditions doctrine that applies to the denial of benefits beyond the privilege of constructing buildings on one's own property. *See* 483 U.S. at 836-39. Even if the nature of the benefit denied in *Nollan* had some bearing on the precise formulation of the constitutional test, the exchange demanded here could not satisfy any conceivable standard.

government officials "to extort a right-of-way to avoid the requirement of just compensation." Pet. App. 13a. If the Fifth Amendment is to have any meaning, "it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.*

Petitioners disagree. "Because the only guarantee of the Fifth Amendment is the availability of just compensation," they assert, "respondent has no Fifth Amendment right to preclude the government from taking his property (or under his theory, from seeking to coerce him to grant property to the government) . . . . when [it] is not exercising its eminent domain power." Pet. Br. 41-42 (internal quotation marks omitted). Consequently, they conclude, the only cognizable claim under the Fifth Amendment is one for compensation for a taking that has already been completed, which never happened here. That argument is unsound.

1. While it is certainly true that in the case of a "classic taking," a property owner may seek a remedy only through a suit for compensation under the Tucker Act, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), this Court has never held that such cases exhaust the scope of the Takings Clause or the remedial authority of the courts. To the contrary, this Court has, for example, barred injunctions that would effectuate a taking, without ever suggesting that the property owner was required to endure the taking and seek only compensation after it was completed. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 169, 178-80 (1979); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). It has further held that declaratory and injunctive relief was available to invalidate government action that would effect a taking. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (striking permit condition that would have effected a taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (same); *Hodel v. Irving*, 481 U.S. 704, 713-18 (1987) (striking down federal statute under Takings Clause ); *see*

*also E. Enters. v. Apfel*, 524 U.S. 498, 519-22, 538 (1998) (plurality opinion) (concluding that federal statute should be struck down under Takings Clause).

Respondent brings no "classic taking" claim. He alleges instead that petitioners engaged in a course of conduct calculated to pressure him into giving up the easement they desired without the BLM ever *having* to "take" that easement and pay just compensation – to induce respondent, in other words, to *waive* his Fifth Amendment right to just compensation. That claim is plainly cognizable under the Fifth Amendment, which provides a single means by which the government may coercively acquire a property interest in private land – through an actual taking with just compensation. As such, the Fifth Amendment necessarily forbids the use of procedures and stratagems designed to extract property while avoiding compensation. No constitutional protection worth its salt can permit its own circumvention through the simple expedient of forced waiver.

2. The Fifth Amendment also prohibits, in plain terms, the taking of private property when no compensation is available. *See* U.S. Const. amend. V ("*[N]or shall private property be taken* for public use, without just compensation.") (emphasis added). That prohibition protects both the people and the public fisc from attempts by executive officials to take private property without legislative authorization.

Petitioners' conduct bears a striking resemblance to the abuses that were in large part responsible for the enactment of the Fifth Amendment. While undoubtedly concerned about the power of legislatures and executive agencies to exercise eminent domain without affording just compensation, the founding generation also recalled with bitterness the widespread practice of military impressments of private property during the revolutionary war. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791-92 (1995). That practice offended the long established

principle that government officials could not take private property without legislative authority, a right laid down in the Magna Carta.[21] *See, e.g., id.* at 787-89. John Jay thus wrote that it was "the undoubted Right and unalienable Priviledge of a Freeman not to be divested . . . [of] Property, but by Laws to which he has assented . . . Violations of this inestimable Right by the King of Great Britain, or by an American Quarter Master; are of the same Nature . . ."[22]

Both as enacted and as originally drafted, the Fifth Amendment strictly prohibited unauthorized takings by executive officials by permitting the taking of private property for public use only when the legislature made just compensation available, thereby ensuring that the taking itself would be legislatively authorized. Madison's original draft of the Fifth Amendment thus provided that "No person *shall be . . . obliged to relinquish his property*, where it may be necessary for public use, without a just compensation." 1 ANNALS OF CONG. 451-52 (Joseph Gales ed., 1834) (emphasis added); *see also* Randall T. Shephard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 853-56 (1989). The plain implication – carried forward in the final text of the amendment – was that where just compensation is unavailable, a taking is constitutionally prohibited.

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[21] Article 39 of the Magna Carta provides that "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta art. 39, *reprinted in* William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (1958).

[22] John Jay, A Hint to the Legislature of the State of New York (1778), *in* 1 JOHN JAY: THE MAKING OF A REVOLUTIONARY, UNPUBLISHED PAPERS 1745-1780, at 461, 462 (Richard B. Morris ed., 1975).

Of course, if the Constitution required Congress to pay for every taking effected by any executive official – no matter how low ranking the officer or how unauthorized the acquisition – it would be true that the only effective limitation imposed by the Takings Clause would be to ensure that Congress paid the public debt accumulated as a result of executive action. But the constitutional structure is the reverse: Congress controls the purse and is entitled to determine when it shall be opened to pay for the taking of private property. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952); *id.* at 631-32 & n.2 (Douglas, J., concurring). Accordingly, this Court has long held that the unauthorized taking of property by executive officials does not subject the United States to liability for just compensation. *See, e.g., Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 127 (1974); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (per Brandeis, J.); *Hooe v. United States*, 218 U.S. 322, 335-36 (1910).

The result is that when Congress denies a Quartermaster the authority to impress private property, there is no right to compensation — but the lack of compensation renders the impressments unconstitutional. And in the absence of a congressionally authorized taking, individuals have a Fifth Amendment right to prevent government officials from exercising dominion over their land, not because the "right to exclude" is inherent in the Fifth Amendment (*contra* Pet. Br. 41), but because the Fifth Amendment protects that state law property interest from invasion in the absence of a taking for which compensation is available. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Congress has required that takings be effectuated through condemnation proceedings initiated by the Attorney General that afford property owners significant substantive and procedural protections, as well as an important measure of political oversight and accountability. *See* 40 U.S.C. §§

3111-3118; Fed. R. Civ. P. 71A. And 43 U.S.C. §1715(a) forbids exercise of this eminent domain power by the BLM unless shown "necessary to secure access to public lands"; *see United States v. 82.46 Acres of Land*, 691 F.2d 474, 477 (10th Cir. 1982). But petitioners have never contended that they were trying to obtain respondent's property pursuant to this delegation of power by Congress.[23] On the contrary, their conduct was an evasion of these statutory limitations as much as it was an end-run around the Fifth Amendment.[24]

Because Congress did not authorize what petitioners did as a means of obtaining respondent's property, respondent would have had no right to compensation under the Tucker Act even if he *had* succumbed to their coercion. In addition, he would have faced the daunting task of proving that what appeared to be a voluntary conveyance was, in fact, a coerced taking of his property.[25] Petitioners can hardly claim, therefore, that instead of suing them, respondent should have caved in, given them the easement, and then sued the United States under the Tucker Act. Where, as here, a suit against the Government is not available, a suit against the

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[23] Even if they had *wanted* to call the Department's (and the public's) attention to their embarrassing negligence in permitting the easement they had obtained from George Nelson to lapse, nothing in the record suggests they could have met the statutory conditions for a condemnation by the BLM.

[24] Petitioners rightly note that a taking may occur through excessive regulation as well, but that does nothing to show that petitioners were entitled to acquire an *easement* on respondent's property outside the eminent domain process.

[25] This Court has specifically held that the impermissible "tend[ency]" of a challenged government action "to discourage" individuals from "insisting upon" their rights "hardly implies that every[one] who [waives those rights] does so involuntarily." *United States v. Jackson*, 390 U.S. at 583. *See Brady v. United States*, 397 U.S. 742, 746, 758 (1970) (holding a *Jackson*-induced waiver "voluntarily and intelligently made").

lawbreaking officials is the quintessentially appropriate remedy. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971); *id.* at 410 (Harlan, J., concurring) (damages remedy against individual officer especially appropriate where "it is damages or nothing").

3. Finally, that petitioners failed to actually obtain respondents' property can be no defense. As illustrated in cases like *Pennsylvania Coal* and *Kaiser Aetna*, one need not acquiesce to government attempts to take property in violation of the Takings Clause before being entitled to challenge them. That Fifth Amendment shield does not evaporate just because the government has failed in its scheme to harass the owner into turning over the property without compensation.[26] Whenever such circumvention succeeds in injuring the owner but not in inducing him to transfer the desired property interest to the government, there has been an obvious violation of the prohibition embodied in the Takings Clause. Surely, the drafters of the Fifth Amendment intended no less protection and remedy to those who resist the Quartermaster's unauthorized coercion than to those who hand over their property at the point of a bayonet.

Accepting petitioners' position would place respondent and others like him in the untenable position of having to choose between enduring indefinitely a campaign of harassment designed to deprive them of both their property

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[26] On the contrary, this Court's practice has been to permit those who resist government pressure to challenge the coercive and punitive character of the actions imposing that pressure in part because the power to treat those who succumbed as having done so involuntarily "might alleviate, but it cannot totally eliminate, the constitutional infirmity" of such actions. *See*, e.g., *United States v. Jackson*, 390 U.S. at 582-83; *accord*, *Parker v. North Carolina*, 397 U.S. 790, 794-95 (1970); *McCann v. Richardson*, 397 U.S. 759, 771 (1970).

and their right to compensation, or giving in to the extortion with the hope that they will later be able to persuade a court that what seemed on its face to be a voluntary gift or bargain was instead an unlawful taking. The Fifth Amendment is plainly less cavalier about property rights than that.

### C. Petitioners Are Not Entitled To Qualified Immunity.

Petitioners do not dispute that qualified immunity would be unavailable if their actions had been designed to punish respondent for "petitioning the government for just compensation," Pet. Br. 40, a First Amendment right, rather than for refusing their demand to give them his property without just compensation, a Fifth Amendment right. But no reasonable official could have believed that the Constitution prohibited the first, but permitted the second. As shown above, petitioners' apparent belief that only First Amendment rights are protected against retaliation contradicts this Court's clear precedent and is patently unreasonable. That there are no reported cases concerning retaliation against the exercise of Just Compensation Clause rights did not deprive petitioners of "fair notice" that they were forbidden to engage in a campaign to beat down respondent's resistance to their unlawful demands until he waived his constitutional right to just compensation. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). This Court's decisions do not require that a defendant's conduct be identical to that in a reported case to defeat claims of qualified immunity. As this Court emphasized in *Pelzer*, "[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.

## III. RESPONDENT'S *BIVENS* CLAIM IS NOT PRECLUDED.

Petitioners argue that even if their conduct violated the Fifth Amendment, no *Bivens* remedy is available in light of alternative remedies under the Fifth Amendment, the Tucker

Act and the APA. Pet. Br. 37. That argument is not properly before this Court and is in any event meritless.

### A. Petitioners' *Bivens* Preclusion Argument Is Not Properly Before This Court.

This Court may not consider the merits of petitioners' *Bivens* preclusion argument because the Tenth Circuit lacked jurisdiction to consider that issue given the procedural posture of this case as an interlocutory appeal on a question of qualified immunity. *See, e.g., Will v. Hallock*, 126 S. Ct. 952, 957 (2006) (having granted certiorari to consider merits of court of appeals' decision, vacating judgment and remanding for dismissal of appeal for lack of appellate jurisdiction).

#### *1. Petitioners'* Bivens *Preclusion Argument Does Not Fall Within The Collateral Order Doctrine.*

Petitioners rightly do not claim that the question whether a *Bivens* remedy is available falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Instead, petitioners attempt to ride on the jurisdictional coattails of the district court's qualified immunity decision – over which the court of appeals had appellate jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) – by asserting that the issues are "inextricably intertwined." Pet. Reply Br. 6. They are not.

This Court has rejected the doctrine of "pendent appellate jurisdiction," lest parties "parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Commission*, 514 U.S. 35, 49-50 (1995). Congress has, instead, provided other mechanisms for seeking interlocutory review of issues falling outside the collateral order doctrine.[27]

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[27] *See* 28 U.S.C. § 1292(b) (certification of orders for interlocutory review); 28 U.S.C. §§ 2072(c), 1292(e) (allowing Supreme Court to expand class of final appealable orders by rule).

*Swint*'s suggestion that review might be permitted for issues "inextricably intertwined with" the denial of qualified immunity or "necessary to ensure meaningful review" of the immunity question, *id.* at 51, is irrelevant to this case. This Court has already described the "*Bivens* inquiry" as "analytically distinct from the question of official immunity." *United States v. Stanley*, 483 U.S. 669, 684 (1987). As petitioners acknowledge, the availability of a *Bivens* remedy turns on whether "Congress has provided what it considers adequate remedial mechanisms for constitutional violations," Pet. Br. 31 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)), while the qualified immunity analysis depends on "whether it would be clear to a reasonable officer that his conduct was unlawful," Pet. Br. 48 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Because there is no overlap between these issues, review of petitioners' *Bivens* preclusion argument is not even necessary, much less "essential" to resolving the question of qualified immunity. *Swint*, 514 U.S. at 51 (citation omitted).

Nor is *Hartman v. Moore*, 126 S. Ct. 1695 (2006), to the contrary. *Contra* Pet. Reply 5-6. There, this Court found "the definition of an element of the tort" plainly within the scope of a qualified immunity appeal, *id.* at 1702 n.5, because the first step in an immunity analysis is to determine whether "the facts alleged show the officer's conduct violated a constitutional right," *Saucier*, 533 U.S. at 201, a step that requires determining what the elements of the constitutional violation are. One can, on the other hand, easily decide whether a defendant violated a clearly established constitutional right without deciding whether *Bivens* is available to remedy that violation. For example, in *Davis v. Passman*, 442 U.S. 228, 234-35 (1979), there was no question that firing an employee because of her sex violated her clearly established constitutional rights. Whether she was entitled to a *Bivens* remedy against a Congressman was an entirely different and unrelated question. *Id.* at 236-49.

### 2. *The Collateral Order Doctrine Does Not Permit An Interlocutory Appeal To Raise A Purely Legal Question Rejected In A Prior Appeal, As Petitioners Seek To Do In This Case.*

Interlocutory jurisdiction is also unavailable because the Tenth Circuit previously considered and rejected the precise *Bivens* preclusion argument petitioners now seek to raise again in an interlocutory appeal. Pet. Br. 9. Petitioners could have sought this Court's review of the first decision, but chose not to. Instead, they returned to the district court, then tried to take an interlocutory appeal to the Tenth Circuit to raise the same arguments a second time in that court. Nothing of relevance changed between the two appeals – the purely legal argument does not depend on the facts of the case which, in any event, have remained unchanged since the first appeal. *See* Pet. App. 36a-37a.

An appeal urging a court to reconsider a prior decision, when nothing in the law or the facts of the case has changed, does not fall within the "small class" of rulings that are "too important to be denied review" on an interlocutory appeal, *Cohen*, 337 U.S. at 546. With few exceptions, the result of such an appeal is foreordained by the law of the case doctrine. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997); *see also Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999).[28] Petitioners have identified no legitimate, much less important, interest served by permitting such hopeless appeals.

Of course, as this Court held in *Behrens v. Pelletier*, 516 U.S. 299 (1996), when the factual predicate of a qualified immunity defense has changed, permitting an additional appeal to consider the defense in the changed context serves an important purpose, *id.* at 309. But this Court's decision in

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[28] The prior decision is also "law of the circuit," not subject to revision by a subsequent panel absent rehearing en banc or an intervening decision of this Court. *See, e.g., In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

*Behrens* did nothing to undercut the principle, which courts of appeals have routinely continued to apply, that interlocutory appeals are not available to raise the same arguments rejected in a prior appeal when nothing of relevance has changed.[29]

### B. Neither The Fifth Amendment, Nor The Tucker Act, Nor The APA Precludes Respondent's *Bivens* Claim.

Petitioners' *Bivens* preclusion argument is meritless in any event. "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980). Nothing in the Tucker Act, the Fifth Amendment, or the APA precludes the quintessential use of *Bivens* to remedy the unconstitutional conduct of federal officials.

#### *1. The Fifth Amendment And The Tucker Act Do Not Preclude Respondent's* Bivens *Claim.*

Petitioners first contend that "no *Bivens* action would be appropriate for an *actual* taking of property under the Fifth Amendment," Pet. Br. 30, because a property owner may obtain just compensation from the Government under the Fifth Amendment or the Tucker Act. *Id.* at 28-30. While true, that is beside the point. The essence of respondent's claim is not that he was subjected to a taking, for which other remedies clearly are available, but that he was subjected to a shadow process, invented by petitioners to coerce him to

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[29] *See, e.g.*, *Cozza v. Network Associates, Inc.*, 362 F.3d 12, 16 (1st Cir. 2004); *Vega v. Miller*, 273 F.3d 460, 466 (2d Cir. 2001); *Grant v. City of Pittsburgh*, 98 F.3d 116, 120 (3d Cir. 1996); *Chambers v. Ohio Department of Human Services*, 145 F.3d 793, 796 n.5 (6th Cir. 1998); *Fairley v. Fermaint*, 471 F.3d 826, 827 (7th Cir. 2006); *Riley v. Camp*, 130 F.3d 958, 967-68 (11th Cir. 1997); *Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999).

relinquish his property without his being able to seek compensation. Petitioners do not, and indeed cannot, claim that the Just Compensation Clause or the Tucker Act provides any remedy for such violations.

*2. The APA Does Not Preclude A* Bivens *Action For Official Conduct Unreviewable Under That Act Because Unrelated To Final Agency Action.*

Petitioners acknowledge that absent an express declaration by Congress, the existence of a statute like the APA precludes an otherwise available *Bivens* remedy only when "the design of [the] Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." Pet. Br. 31 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).[30]

Even if the APA were to preclude *Bivens* actions for some constitutional violations by agency officials, it surely does not preclude relief for unconstitutional conduct that is not even *subject* to the APA because it is "unrelated to any final agency action." Pet. App. 81a-82a. Essentially, petitioners ask this Court to hold that Congress made a conscious decision that there should be no remedy whatsoever for private citizens subjected to unconstitutional conduct by agency officials deploying their official powers so far outside their agency's proper responsibilities that their acts are not even related to agency action. The assertion that Congress has intended to preclude all relief for unconstitutional conduct

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[30] Petitioners do not suggest that Congress expressed a preclusive intent "by statutory language [or] clear legislative history." *Bush v. Lucas*, 462 U.S. 367, 378 (1983). Nor do they argue that there are other "special factors" counseling hesitation in applying *Bivens*, such as the "special nature of military life," *United States v. Stanley*, 483 U.S. 669, 681, 679 n.17 (1987), or the uniquely sensitive relationship between the federal government and its employees, *Bush v. Lucas*, 462 U.S. 367, 388-89 (1983).

is so "extraordinary," that it requires "'clear and convincing' evidence" of congressional intent, *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (citation omitted), something petitioners have not provided.

This Court has repeatedly applied *Bivens* to afford a remedy when "the plaintiff lacked any other remedy for the alleged deprivation," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001) (citing *Davis*, 442 U.S. at 245), and even when a remedy was available but plainly inadequate, *id.* at 67-68 (citing *Carlson*, 446 U.S. at 18-23). And when this Court has declined to permit a *Bivens* remedy in light of a federal statute, it has stressed that doing so would leave "an avenue for some redress," even if not a fully compensatory damages remedy. *Malesko*, 534 U.S. at 69 (citing *Chilicky*, 487 U.S. at 425-27); *see also Bush*, 462 U.S. at 388. While petitioners may think that the constitutional violations alleged in this case are "too insignificant to merit" judicial review, Pet. Br. 33, they have provided no reason to think Congress shared that disregard for its citizens' constitutional rights.

In fact, there is nothing in the design, language, or history of the APA to suggest that Congress intended that statute to supplant *Bivens* actions against individual federal officials who violate citizens' constitutional rights, even when it applies and provides a partial administrative remedy. This Court has routinely entertained *Bivens* actions against officials of federal agencies that are subject either to the APA or to similar administrative review systems. *See, e.g.*, *Hartman v. Moore*, 126 S. Ct. 1695 (2006); *Farmer v. Brennan*, 511 U.S. 825 (1994); *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Cleavinger v. Saxner*, 474 U.S. 193 (1985). The APA is an avenue of last (not first and only) resort, authorizing judicial review under the Act only when "there is no other adequate remedy in a court." 5 U.S.C. § 704. Congress also provided that the APA's judicial review provisions "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law," 5 U.S.C.

§ 559, further illustrating its intent that the APA supplement, not supplant, other law governing agencies and their officials. For example, the APA does not preclude a claim for damages under the Federal Tort Claims Act, even when the official's conduct giving rise to liability would have been subject to review under the APA. *See Beins v. United States*, 695 F.2d 591, 597-98 (D.C. Cir. 1982). There is no reason to think that Congress somehow intended the APA to preclude an action based on the same facts under *Bivens*.[31]

Nor is this a case in which the comprehensiveness of a specialized regulatory regime demonstrates a "congressional unwillingness to provide consequential damages," *Chilicky*, 487 U.S. at 426. The APA bears no resemblance to the statutes reviewed in *Chilicky* and *Bush v. Lucas*, 462 U.S. 367 (1983), both cases in which Congress had – after prolonged study and "repeated consideration of the conflicting interests involved" in a specific area of government activity, *Bush*, 462 U.S. at 385 – enacted administrative regimes tailored to the special contexts of federal employment (*Bush*) and social security (*Chilicky*) claims. Each of those regimes created systems of administrative and judicial review far more elaborate and detailed than the default procedures of the APA. *See Bush*, 462 U.S. at 386-88; *Chilicky*, 487 U.S. at 424. And in both cases, Congress provided "meaningful remedies" for constitutional violations. *Bush*, 462 U.S. at 386; *see also Chilicky*, 487 U.S. at 425.

The APA shares none of those special features, providing instead a default set of basic procedures and limited remedies applicable to agency action across the board. Nor can petitioners seriously contend that the APA provides what Congress considered "adequate remedial mechanisms for constitutional violations," *Chilicky*, 487 U.S. at 423, arising

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[31] The FTCA, however, requires a plaintiff to choose between an FTCA action against the Government or a *Bivens* action against the official. *See* 28 U.S.C. § 2676.

under every federal regulatory regime. The Act permits a court only to order, or set aside, agency action, *see* 5 U.S.C. § 706 – equitable relief that is "is useless to a person who has already been injured," *Butz v. Economou*, 438 U.S. 478, 504 (1978), and who cannot demonstrate that the illegal conduct is ongoing or likely to be repeated, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Petitioners cannot claim, for example, that the APA would have afforded respondent any remedy for the unconstitutional inducement of the criminal prosecution against him or for any of the various completed acts of harassment and intimidation that form much of the basis of his constitutional claim.[32] For such actions, "as [in] *Bivens*, 'it is damages or nothing." *Davis*, 442 U.S. at 245 (italics added, citation omitted).

Moreover, the APA cannot preclude a *Bivens* action where, as here, the administrative process cannot even entertain a citizen's constitutional claims. The IBLA refused to consider respondent's claim that various administrative acts were unconstitutional because they were undertaken to coerce him to waive, and punish him for asserting, his Fifth Amendment rights. The Board explained that it was not a "court[] of general jurisdiction empowered to hear and rule on such allegations or to provide relief for proven violations," *H. Frank Robbins*, 170 I.B.L.A. 219, 227 (2006). Accordingly, the Board "has no authority to invalidate an otherwise valid BLM grazing trespass decision based on proof of improper motive on the part of a BLM official or employee involved in

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[32] In fact, given the unending variety of means employed by petitioners, it is difficult to imagine that respondent could have secured, or a court could have crafted, an effective injunction against the conspiracy. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 495-97 (1983); *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 76 (1967); *see also* Fed. R. Civ. P. 65(d).

the development or issuance of the decision." *Id.* As a result, the Board has refused to allow respondent to develop evidence in the administrative record to support his claim of unconstitutional purpose. *See id.* at 228-30; *see also* 5 U.S.C. § 706 (providing for judicial review based upon administrative record).

The APA also provides no basis to review constitutional violations that arise not from a particular discrete agency action, but rather from the cumulative effect of a pattern of harassment of the sort employed in this case. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). The unconstitutional coercion and retaliation against respondent arose from the accretion of many acts of harassment, no single one of which would necessarily have established a constitutional violation standing in isolation. *Cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (hostile work environment claim "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own"). The APA is thus a particularly ill suited remedy for a conspiracy that threatens its victim's business with death by a thousand cuts.

If the mere availability of a possible administrative remedy and judicial review of agency action were sufficient to preclude a *Bivens* action, there would have been no reason for this Court in *Bush* and *Chilicky* to discuss the elaborate and comprehensive nature of the remedial schemes enacted for federal employment and social security claims or Congress's frequent and intense attention to the need to balance individual and governmental interests in those particular contexts. The generic, limited nature of a federal statute is, instead, strong reason to think that Congress did not intend it to supplant other statutory or judicial remedies like *Bivens*. Thus, in *Carlson v. Green*, 446 U.S. 14 (1980), this Court held that the Federal Tort Claims Act – which, like the

APA, provides a generalized remedy for official conduct across all areas of federal activity – does not preclude a *Bivens* action against a federal official. The Court explained that "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States." *Id.* at 21. The same is true here – the APA remedy runs against the federal agency, not the federal official. Moreover, while the FTCA at least provides a *Bivens*-like remedy of compensatory damages, the APA does little to fulfill *Bivens'* important role of ensuring compensation for the victims of unconstitutional conduct. *See Bivens*, 403 U.S. at 397. Accordingly, there is no reason to believe that Congress would have intended the APA to preclude a *Bivens* remedy for the unconstitutional conduct of agency officials, while intending the much more analogous damages remedy under the FTCA to co-exist with the *Bivens* cause of action.[33]

## IV. PETITIONERS DO NOT ENJOY QUALIFIED IMMUNITY AGAINST RESPONDENT'S RICO CLAIM.

Petitioners' conduct – abusing official power to extract property from another – is classic extortion under color of official right. Petitioners insist, however, that the Court must recognize an exception to the language of the Act and the historical conception of extortion, lest public officials face the specter of RICO liability for doing nothing more than aggressively bargaining on behalf of the Government. While

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[33] Congress's ratification of *Carlson* in the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988), provides further reason to doubt petitioners' preclusion claim. *See* 28 U.S.C. § 2679(b)(2); H.R. Rep. 100-700, 1988 U.S.C.C.A.N. 5945 at 5949-50. It would be passing strange for Congress to have taken steps to confirm the availability of *Bivens* actions against federal employees if it believed that the APA already precluded nearly all *Bivens* suits against officials of administrative agencies.

important, that concern is adequately met by enforcing the protections already built into the Hobbs Act. That statute prohibits only "wrongful" conduct and punishes only willful violations. Those limitations preclude liability for officials whose bargaining tactics are actually authorized by law or who act on the basis of a good faith mistake. Neither situation arises in this case, however, as the lower courts found that respondents' evidence establishes a triable issue regarding petitioners' good faith and intentions. There is no basis to sidestep that traditional inquiry and hold that petitioners are entirely immune simply because they engaged in extortion on behalf of their employer through the abuse of their otherwise authorized regulatory powers.

### A. There Is No Qualified Immunity Defense Against Charges Of Extortion Under RICO.

While the court of appeals and the parties have to this point assumed that qualified immunity is available in a civil RICO action predicated on violations of the Hobbs Act and the Wyoming blackmail statute, that assumption is ill-founded and should be rejected by this Court.[34]

This Court developed the qualified immunity defense through an interpretation of 42 U.S.C. § 1983, a Reconstruction Era statute that does not purport to define claims and defenses, but rather provides a cause of action for violations of a broad range of often ill-defined constitutional

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[34] The existence of a qualified immunity defense being a precondition for interlocutory appellate jurisdiction, respondent's failure to raise this argument in the lower courts did not waive the objection. *See Will v. Hallock*, 545 U.S. 1103 (2005) (raising question of appellate jurisdiction over interlocutory appeal sua sponte). Moreover, a "respondent can support his judgment on any ground that appears in the record," *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 134 n.3 (1947), even if the issue is raised for the first time in this Court, *see Schweiker v. Hogan*, 457 U.S. 569, 584-85 & n.24 (1982).

prohibitions. *See, e.g.*, *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980). Given Section 1983's (and, later, *Bivens*') unique role in constitutional adjudication, this Court has concluded that Congress intended Section 1983 to operate against a backdrop of "firmly rooted" common law defenses. *Id.* at 637 (citation omitted). Under that assumption, this Court initially recognized a substantive "good faith" defense for public officials in Section 1983 suits. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967); *see also Butz*, 438 U.S. at 503-04 (extending defense to *Bivens* claims). Subsequently, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), converting the good faith defense into an immunity asking whether a reasonable person would have known that the defendant's conduct violated a clearly established right. *See Wyatt v. Cole*, 504 U.S. 158, 165 (1992) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). But since that time, this Court has not extended the ahistorical policy-based immunity to new contexts even under Section 1983 itself. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Wyatt*, 504 U.S. at 166-69; *see also id.* at 171 (Kennedy, J., concurring) (noting that qualified immunity doctrine was a "depart[ure] from history in the name of public policy" and stating that "I would not extend that approach to other contexts").

This Court should not extend Section 1983's judicially crafted defenses to RICO, a modern statute that directly and comprehensively addresses who should be liable under the statute and under what conditions, providing for civil liability upon "a violation of" the statute – not upon a violation of a clearly established RICO right. *See* 18 U.S.C. §§ 1962, 1964(c). Nor is there is any indication that a defendant's status as a public official afforded him an immunity from criminal or civil liability for extortion at common law. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35

UCLA L. Rev. 815, 839, 846, 848, 850-52 (1988) (documenting that damages awards were common in early English practice without any indication of immunity); *Hale v. McDermott*, 137 N.Y.S. 975, 976 (App. Term 1912) (same); *see also Willett v. Devoy*, 155 N.Y.S. 920, 920 (App. Div. 1915); *People v. Eichler*, 26 N.Y.S. 998, 998-1000 (Gen. Term 1894). And, of course, the objective *immunity from suit* demanded here was developed only recently by this Court in derogation of the common law.

Moreover, even if it were proper for this Court to "transform what existed at common law based on [its] notions of policy or efficiency," *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring), there is no reason to do so here. Civil liability for criminal conduct does not risk "unwarranted timidity on the part of public officials" or discouragement of "the vigorous exercise of official authority," *Richardson*, 521 U.S. at 408 (citation omitted), beyond that which the prospect of criminal punishment already (and intentionally) provides.

In addition, by requiring "wrongful" conduct, the Hobbs Act necessarily precludes conviction when the defendant (unlike petitioners in this case) has done nothing more than engage in authorized forms of hard bargaining or vigorous regulatory enforcement. That protection is reinforced by the requirement, common to criminal statutes, of proof that the defendant's violation of the Act was willful.[35] While neither element provides an immunity from suit, each serves the same principal function as qualified immunity, restricting liability to those cases in which the defendant was on notice that his conduct was unlawful. *Cf. United States v. Lanier*, 520 U.S. 259, 270 (1997).

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[35] *See, e.g., United States v. Cruzado-Laureano*, 404 F.3d 470, 480 (1st Cir. 2005); *United States v. Harmon*, 194 F.3d 890, 892 (8th Cir. 1999; *United States v. Stephens*, 964 F.2d 424, 429 (5th Cir. 1992).

There is no need to supplement the protections Congress has already provided. It makes little sense to require a plaintiff to prove *both* that a reasonable official in the defendant's position would know that his conduct was unlawful (to overcome qualified immunity) and then, in later proceedings to establish liability, that the defendant engaged in *willful* extortion. Cf. *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 & n. 10 (1985) (interlocutory appeal permitted for qualified immunity because it is "completely separate from the merits").

### B. Petitioners' Conduct Plainly Falls Within The Clearly Established Definition of "Extortion."

The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioners do not dispute that an easement is "property" within the meaning of the Hobbs Act, that they attempted to obtain that property from respondent (on behalf of their employer), or that they undertook this activity under color of official right. Their conduct thus falls easily within the text of the statute, which ordinarily would be the end of the matter. *E.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

Petitioners nonetheless insist that the Act does not apply here because the court of appeals assumed that their conduct was "authorized" and because they undertook the extortion for the benefit of the Government. Neither fact, even if true, creates a defense under the statutory language or historical understanding of extortion.

#### *1. Petitioners' Abuse Of Their Regulatory Powers To Obtain Respondent's Property Constitutes Classic Extortion.*

Petitioners' assertion that their conduct was "authorized" and therefore could not be extortionate, confuses two issues:

(1) whether the tools of extortion they used were among their authorized regulatory powers; and (2) whether Congress authorized those tools to be used to extort property in evasion of the Fifth Amendment. Respondent accepts that the Hobbs Act would not be violated here if Congress had authorized petitioners to engage in a pattern of harassment, selective enforcement of regulations, filing false criminal charges, and trespassing on respondent's property for the purpose of coercing respondent to give the Government an easement to which it was not legally entitled and for which it was unwilling to pay just compensation. That result would be compelled not by anything in the definition of "extortion," but by the simple principle that federal statutes must be read to avoid unnecessary conflict: the Hobbs Act should not be construed to criminalize conduct another statute specifically authorizes or requires. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974).

But, as discussed above, the Tenth Circuit could not have concluded that Congress authorized petitioners to use their vast administrative powers to circumvent the Just Compensation Clause in the manner established by the summary judgment evidence in this case. The use of regulatory authority for the unauthorized purpose of wresting property from a citizen is classic extortion, not "overzealous regulation." For example, in *Evans v. United States*, 504 U.S. 255 (1992), a county commissioner committed extortion by implicitly promising to vote for a rezoning application in exchange for cash. Voting in favor of the proposal was indisputably within the commissioner's lawful authority, in the same way that some of petitioners' extortionate conduct may have involved acts within their lawful authority in this case. But, like petitioners here, the commissioner in *Evans* exercised his lawful authority for an unlawful purpose and thereby ran afoul of the Hobbs Act. *See also, e.g., United States v. Gillock*, 445 U.S. 360 (1980) (state senator blocked a defendant's extradition and agreed to introduce legislation);

*United States v. Swift*, 732 F.2d 878, 879 (11th Cir. 1984) (city official who "had authority" to approve payment requests facilitated approvals); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971) (defendants threatened to deny approval of intrastate stock issues).[36]

*2. There Is No Absolute Immunity For Extortion On Behalf Of The Government.*

Petitioners next assert that they did not attempt to "wrongfully . . . obtain" respondent's property within the meaning of the Hobbs Act because they did not seek to extort the property for their own personal gain, but instead for the benefit of their employer, the federal government. Pet. Br. 18-21. That argument – which seeks not simply qualified, but absolute immunity for acts of governmental extortion – is meritless.

That petitioners did not seek property for themselves does not mean that they did not seek to "obtain[] . . . property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2). To the contrary, "extortion as defined in the [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). Rather than focusing on the benefit to the defendant, the "gravamen of the offense is loss to the victim." *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977). Accordingly, "whether a Hobbs Act defendant personally receives any benefit from his alleged extortion is largely irrelevant." *United States v. Clemente*, 640 F.2d 1069, 1079 (2d Cir. 1981). Thus, as petitioners acknowledge (Pet. Br 20), this Court and others have repeatedly affirmed Hobbs

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[36] If this Court holds that "authorized" conduct cannot violate the Hobbs Act, it must remand for the Tenth Circuit to consider whether its presumption of authorization reflects the facts and, if not, whether petitioners are nonetheless immune from suit.

Act convictions when the extortionist sought property for the benefit of fellow union members,[37] a charity,[38] political parties and allies,[39] friends,[40] or other third parties.[41]

Nor can petitioners identify anything in the language, history, or purposes of the Act that carves out an exception when the defendant obtaining property for his employer works for a government rather than a crime syndicate, union, corporation, or charity. If a public official may not extort an easement for the benefit of his union (say, to provide access to a union hall), there is no reason to think that the Act permits the same officer to engage in the same extortion – inflicting precisely the same injury on the victim – if the official demanded the easement for the City (say, for access to a police station or because the union hall was located on city property).[42]

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[37] *Green*, 350 U.S. at 420; *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959); *United States v. Kemble*, 198 F.2d 889, 890-91 (3d Cir. 1952).

[38] *United States v. Hairston*, 46 F.3d 361, 365-66 (4th Cir. 1995).

[39] *United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982); *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *abrogated on other grounds by McCormick v. United States*, 500 U.S. 257, 266 n. 5 (1991).

[40] *United States v. Scacchetti*, 668 F.2d 643, 647 (2d Cir. 1982).

[41] *United States v. Provenzano*, 334 F.2d 678, 685-86 (3d Cir. 1964) (defendant coerced victim to put a third party attorney on retainer).

[42] There is nothing unusual about a law that criminalizes official misconduct even when it is purportedly undertaken for the benefit of the Government. Congress has, for example, criminalized a public official's violation of constitutional rights even when the defendant was not attempting to benefit himself. *See, e.g.*, 18 U.S.C. § 242.

That conclusion is consistent with the understanding of extortion codified in the Field Code, one of the two sources of New York law used as models for the Hobbs Act, *see Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003), which illustrated its meaning by reference to *People v. Whaley*, 6 Cow. 661 (N.Y. Sup. Ct. 1827). *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. REV. 815, 893 (1988). The principal issue on appeal in *Whaley* was the claim of the defendant – a judge accused of extorting money by falsely telling a defendant he owed a judgment to a plaintiff – that the indictment was defective because "the defendant is not charged with taking the money, *as fees*, or *to his own use*." *Whaley*, 6 Cow. at 661 (emphasis in original). The court easily rejected that argument: "It was not necessary to lay the offence in that manner; it is sufficient that he extorted it by color of his office." *Id*; *see also, e.g., Willett v. Devoy*, 170 A.D. 203, 204 (N.Y. App. Div. 1915) (no defense that clerk paid extorted fees over to municipality because "[n]o distinction is made on the ground that the official keeps the fee himself").

In fact, during the time in which the common law crime of extortion was first developed, a distinction between extortion benefiting an official and extortion benefiting the government would have been difficult to draw. Many public officials were paid not by salary, but through an entitlement to keep a portion of the fees they collected. 10 William Holdwsorth, A HISTORY OF ENGLISH LAW 153, 499 (1938); Jeremy Gayed, *"Corruptly": Why Corrupt State of Mind is an Essential Element for Hobbs Act Extortion Under Color of Official Right*, 78 NOTRE DAME L. REV. 1731, 1737 (2003). In those circumstances, the collection of any fee – lawful or extortionate – was always an act that benefited both the official and the state.

As discussed above, RICO and the Hobbs Act accommodate the special nature of government employment

in more tailored ways than simply immunizing officials from liability altogether. When Congress has truly authorized "hard bargaining" techniques for the purpose of obtaining property on the Government's behalf, the authorized conduct is not "wrongful" and cannot be construed to violate the Hobbs Act. And the requirement of willfulness provides additional protection against liability for good-faith mistakes in the exercise of official duties. There is no need to go further and provide blanket immunity to those who willfully abuse their public authority through classic acts of extortion simply because the Government benefits from the crime.

*3. Petitioners Are Not Entitled To Qualified Immunity.*

Petitioners have not contested that their conduct, if undertaken without authorization and on behalf of a non-governmental employer, would constitute "a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402. *See* Pet. App. 17a. That should end the matter. For no reasonable official could have believed that Congress authorized him to file false criminal charges against respondent, invade his property, harass his guests, and undertake a pattern of selective enforcement of agency regulations to coerce him into giving the Government his property without just compensation. Nor could any reasonable official believe that he could lawfully engage in extortion on behalf of the Government, when he clearly could not do so on behalf of any other employer or third party. No court has ever so held and petitioners have cited nothing that could make such a belief plausible.

## CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

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No. 06-219

# In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

*v.*

HARVEY FRANK ROBBINS

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## INTRODUCTION

The interspersed nature of public and private lands in the West, and the federal government's responsibility for managing public lands, creates numerous sources of potential friction among landowners. Congress and the Bureau of Land Management (BLM), in turn, have provided numerous avenues to address private landowners' complaints. Landowners may file an action under the Tucker Act, 28 U.S.C. 1491, for just compensation for any physical taking of their property, or for any regulation that they claim *amounts* to a taking. They may seek to enjoin conduct that they claim will amount to an uncompensated taking. They may challenge any alleged trespass or related invasion under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346. They may challenge regulatory actions through agency procedures, such as the Interior Board of Land Appeals (IBLA). And they may challenge any final agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

Respondent alleges that the government has interfered with his property rights, but he does not seek to invoke any of those established mechanisms. Although his Fifth Amendment claim is grounded solely on the Just Compensation Clause (see Br. 11 n.11), he has not alleged either a physical or regulatory taking. He has not sought relief under the FTCA or the APA. And, while he has filed numerous administrative claims—all of which have been rejected by the IBLA—he now claims (Br. 9-10) that the available administrative process is too burdensome to exhaust. Instead, respondent asks this Court to recognize an action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, carrying the threat of treble damages against federal officials in their personal capacities, and a new constitutional tort against federal officials under the Just Compensation Clause and *Bivens* for virtually any alleged interference with a property owner's state law right to exclude.

Not only would respondent's theory require this Court to expand dramatically the scope of *Bivens*, the Just Compensation

Clause, and RICO, it would severely undermine the government's ability to manage the millions of acres of public lands that are interspersed with private lands in the West. Neither respondent nor his amici have provided any reason for the Court to take such an extraordinary step. And they certainly have provided no reason for this Court to deprive petitioners of qualified immunity from the novel damages claims before the Court.

## I. THIS CASE INVOLVES THE MANAGEMENT OF PUBLIC LANDS, NOT AN INTRUSION ON PRIVATE LAND

Because respondent's theory of the case has evolved, it is worth reviewing the basic dispute that gave rise to this action. This case began as a challenge to BLM's decision to cancel a right-of-way over a 14-mile stretch of public land granted to the prior owner of the High Island Ranch after respondent refused to consent to a 4-mile reciprocal easement over private lands in the area. See J.A. 89 (illustrating easement). The easement was sought to ensure that BLM would be able to cross interspersed parcels of private land in order to reach public lands adjacent to the upper northwest portion of the High Island Ranch, located in the Rock Creek allotment. See J.A. 136 (map). Access to that area was necessary, among other things, to reach a wilderness study area and to manage critical wildlife habitats (including an Elk calving area) as well as the Rock Creek allotment itself. BLM canceled the right-of-way after respondent declined to grant the reciprocal easement and failed to pay the required rental on the right-of-way. See C.A. App. 42-43.[1]

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[1] Respondent claims (Br. 4) that the reciprocal easement and the right-of-way were "markedly unequal." That is incorrect. The right-of-way had a duration of 30 years and applied to a 14-mile stretch of public lands, whereas the reciprocal easement for the government had a duration of 20 years and applied to a 4-mile stretch of respondent's land. Respondent points (Br. 4) to differences concerning the use of the easement by mining companies, but those differences merely reflect the fact that the government owns the subsurface mineral rights to both the public and private lands at issue.

Respondent now concedes (Br. 6) that it was at least "plausible" for BLM to maintain that "respondent had a legal duty to give the BLM an easement [over private land] in exchange for a right-of-way [over public land]." And federal law permits BLM to secure such commonsense, reciprocal arrangements. Pet. Br. 3-4. As a result, respondent has shifted his focus away from this reciprocal arrangement to discrete regulatory actions that BLM undertook in the course of managing public lands in the area. Specifically, respondent now grounds his RICO and Fifth Amendment claims on alleged "harassment, selective enforcement of regulations, filing false criminal charges, and trespassing." Resp. Br. 46; see *id.* at 6-10. Each of those alleged actions was amenable to challenge through administrative complaints or specific judicial remedies, and respondent unsuccessfully attempted to challenge many (though not all) of them before the IBLA. See Pet. Br. 6-8.

Moreover, BLM took each of the alleged actions in fulfilling its duty to manage public lands. The alleged "harassment" of respondent's cattle drives was based on BLM's efforts to document respondent's trespasses on public lands. Many of those trespasses were on grazing allotments assigned to neighboring ranchers who complained to BLM about respondent's repeated trespasses on their allotments. See C.A. Supp. App. 931-933, 1003-1005. The alleged selective enforcement was based on respondent's trespasses and other violations of the terms of his grazing permits and special use permits. Those violations resulted in BLM's decisions not to renew respondent's permits, actions that were upheld by the IBLA. The alleged false criminal charges were brought after respondent physically impeded BLM officers who were exercising the right of administrative access to reach public lands. And the alleged trespasses were based on BLM's efforts to monitor respondent's use of public lands.

All of the administrative actions on which respondent focuses concern alleged trespasses by BLM officials seeking to access interlocked parcels of public land, and all of them relate to respon-

dent's disagreement with formal IBLA adjudications confirming that respondent's grazing and recreational use permits provide BLM a right of administrative access over respondent's land to protect interlocking parcels of public land and ensure compliance with the terms of the permits. See 154 I.B.L.A. 93, 95-96 (2000); see also 43 C.F.R. 4130.3-2(h); C.A. App. 61. Respondent declined to invoke his right under the APA to challenge the results of those IBLA proceedings in federal court.[2]

In short, while respondent seeks to portray himself as a victim of federal intrusion on his land, this case involves one landowner's insistence on enjoying the benefits of *public* lands while refusing to honor the responsibilities that the government has long required of those who use the public domain, in order to protect and preserve public lands and resources. Neither RICO, the Fifth Amendment, nor *Bivens* gives a landowner a right to insist on such a one-sided land use regime.

## II. RESPONDENT HAS FAILED TO SHOW A RICO VIOLATION

As petitioners have explained (Br. 15-27), respondent's RICO claim suffers from two fatal flaws. First, RICO—an organized crime statute—was never designed to reach federal officials acting within the scope of their authority to further legitimate governmental aims, such as public land management. Second, to

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[2] For example, in the IBLA proceeding upholding BLM's decision not to renew respondent's recreational use permit over public lands, the IBLA cited respondent's "pattern of violating the terms and conditions of his various public use authorizations," including the fact that respondent had been "cited for trespass for unauthorized blading of a road on pulic lands, been in noncompliance with his grazing permit on at least 20 occasions, and received formal notices regarding 11 different grazing trespasses, 7 of which settled and 4 of which are the subject of pending [IBLA] appeals." 154 I.B.L.A. at 98; see *id.* at 94-95. The IBLA decisions also recognized and endorsed BLM's practice of photographing or videotaping respondent's trespasses, including unauthorized cattle drives, on public lands. 167 I.B.L.A. 239, 247 n.8 (2005). The IBLA also found that the administrative record shows that "intransigence was the tactic of [respondent], not BLM." 146 I.B.L.A. 213, 219 (1998).

establish the predicate offense of extortion, a plaintiff must show both that government officials act with a "wrongful" intent, *i.e.*, that officials seek something of value that they are not due in exchange for official conduct, and that the officials actually "obtain" something of value for the private benefit of themselves or another. Neither of those traditional elements of the common law offense of extortion is present here.

Respondent concedes that no court has applied RICO against public officials acting pursuant to their lawful authority to obtain a reciprocal property interest on behalf of the United States. He also concedes (Br. 42) that the predicate offense of extortion "prohibits only 'wrongful' conduct and punishes only willful violations" of the Hobbs Act, 18 U.S.C. 1951. Moreover, respondent "accepts that the Hobbs Act would not be violated here if Congress had authorized petitioners to engage in [the challenged administrative actions]." Resp. Br. 46. But, notwithstanding respondent's unfounded and pejorative labels for the challenged regulatory actions, the court of appeals expressly assumed that "*each*" of the administrative actions about which respondent complains was authorized. Pet. App. 17a-18a (emphasis added). The court nevertheless held that the allegation of an intent to "extort" made their otherwise lawful regulatory conduct extortion under RICO. *Id.* at 18a. That holding cannot stand.

As an initial matter, there is no evidence that Congress intended RICO to apply to the types of administrative actions at issue here, particularly given that those actions are already subject to review by the APA, the FTCA (in cases of torts, such as trespass, committed by government officials), and the Tucker Act (in cases of physical or regulatory takings of property).[3] The

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[3] The FTCA waives the United States' sovereign immunity from suit where local law would make a private person liable in tort. See *United States* v. *Olson*, 126 S. Ct. 510, 512 (2005). States, including Wyoming, recognize the tort of trespass and typically define it in terms of the "right to exclude." See, *e.g.*, *Edgcomb* v. *Lower Valley Power & Light, Inc.*, 922 P.2d 850, 859 (Wyo. 1996). There are FTCA cases involving trespass claims, see, *e.g.*, *Lhotka* v. *United*

government itself could not be held liable under RICO for the administrative actions in question. See, *e.g.*, *United States* v. *Bonanno Organized Crime Family*, 879 F.2d 20, 21-27 (2d Cir. 1989) (United States is not a "person" who can sue or be sued under RICO, because Congress did not intend "to expose the government to RICO liability"); cf. *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941) (employing similar reasoning in holding that the United States was not a "person" that could sue or be sued under Section 7 of the Sherman Act); accord *USPS* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 743-745 (2004). Respondent cannot avoid Congress's decision to exclude the *government* from the reach of RICO liability by alleging that BLM itself "is an enterprise within the meaning of [RICO]." J.A. 76. Nor can he circumvent that limitation attacking BLM officials acting pursuant to their legal authority and seeking to obtain a reciprocal easement for the "UNITED STATES OF AMERICA, and its assigns," see J.A. 90.

Respondent does not attempt to defend the court of appeals' holding that the applicability of RICO turns solely on the subjective intent of government officials. See Pet. App. 18a. That holding is seriously flawed and in itself requires reversal. As this Court recognized in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982), "substantial costs attend the litigation of the subjective good faith of government officials." "Judicial inquiry into subjective motivation" often is incapable of resolution without protracted discovery and fact-finding. *Id.* at 817. As a result, "[i]nquiries of this kind can be peculiarly disruptive of effective

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*States*, 114 F.3d 751, 753-754 (8th Cir. 1997), as well as cases involving both trespass claims under the FTCA and takings claims under the Tucker Act, see, *e.g.*, *Northwest La. Fish & Game Preserve Comm'n* v. *United States*, 446 F.3d 1285, 1289-1291 (Fed. Cir. 2006). Respondent filed an administrative tort claim. That claim was denied, and he did not pursue any FTCA action in court. Similarly, a landowner may challenge the government's denial of a right-of-way as a taking under the Tucker Act. See, *e.g.*, *Washoe County* v. *United States*, 319 F.3d 1320, 1325-1328 (Fed. Cir. 2003).

government"—causing "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816-817. Subjecting government officials to the threat of RICO liability for "lawful actions" (Pet. App. 18a) depending solely on their subjective "intent" (*ibid.*) would impose all of the costs that this Court recognized in *Harlow*, not to mention create an especially potent deterrence to public service given the threat of treble damages.

In any event, it makes no sense to speak of an "extortionate" or "wrongful" intent in the context of a RICO claim against government officials where those officials acted within their regulatory authority and there is no allegation that the officials acted in exchange for a private gain for themselves or another. See Pet. 18-23. Indeed, in *Evans* v. *United States*, 504 U.S. 255, 260 (1992), the Court observed that "[e]xtortion by the public official was the rough equivalent of what we would now describe as 'taking a bribe.'" See R. Perkins & R. Boyle, *Criminal Law* 528 (3d ed. 1982) ("Bribery is the corrupt payment or receipt of a *private price* for official action.") (emphasis added).

Respondent now concedes (Br. 6, 14) that it was at least "plausible" for BLM to seek a *reciprocal* easement from respondent. That concession alone is fatal to his claim that the alleged attempt to obtain an easement for the United States was "wrongful" and thus extortionate. Moreover, as discussed, respondent has essentially abandoned reliance on BLM's cancellation of his right-of-way as a basis for his RICO and *Bivens* claims, and instead now relies on a litany of alleged administrative actions that relate to alleged trespasses by BLM officials seeking to access interlocked public lands. But there is nothing "extortionate" about such alleged trespasses. Rather, they boil down to disputes between adjoining public and private landowners about the existence and scope of the government's right of administrative access over private land to inspect and manage interlocking parcels of public land. Moreover, as discussed, the IBLA affirmed the government's right of administrative access. See p. 4, *supra*.

In addition, respondent's RICO claim fails because respondent cannot establish that petitioners "obtain[ed]" his property within the meaning of the Hobbs Act and the common law offense of extortion. See Pet. Br. 22-23. As this Court has observed, "[e]xtortion under the Hobbs Act requires a 'wrongful *taking* of . . . property.'" *Scheidler* v. *NOW*, 537 U.S. 393, 404 (2003) (internal quotation marks and citation omitted); see *Evans*, 504 U.S. at 260 n.4 (quoting definitions). In *Scheidler*, this Court refused to replace the Hobbs Act's requirement "that property must be *obtained* from another * * * with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." 537 U.S. at 405 (emphasis added). Thus, the Court concluded that there was "no basis" for the extortion claim, even though there was "no dispute * * * that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights." *Id.* at 404; see *id.* at 409 (distinguishing extortion from the common law offense of coercion).

The RICO extortion claim in this case fails for the same reason. The "essence of respondent's claim" (Br. 35) is that the government has *not* taken his property, but instead has sought to "coerce" (J.A. 76, 77 (complaint)) him to give property to the government (which he has not done). Thus, even if it were true that petitioners "interfered with, disrupted, and in some instances completely deprived respondent[] of [his] ability to exercise [his] property rights," under *Scheidler* there would still be "no basis" upon which to find extortion. 537 U.S. at 404, 409. Moreover, to the extent that respondent's claim is that BLM's regulatory actions have interfered with his ability to "conduct his business" (Br. 24), then the alleged interference with property in this case is even more directly analogous to the alleged interference in *Scheidler*. See 537 U.S. at 401, 404-405.

## III. RESPONDENT HAS FAILED TO SHOW ANY ACTIONABLE VIOLATION OF THE FIFTH AMENDMENT

### A. There Is No Basis To Extend *Bivens* To This New Context

As petitioners explained in their opening brief (Br. 27-37), respondent's *Bivens* claim under the Just Compensation Clause of the Fifth Amendment is precluded by statutory remedies, as well as the nature of the Just Compensation Clause itself. At the very least, there are powerful reasons counseling hesitation in fashioning such a new constitutional tort.

1. As an initial matter, the *Bivens* preclusion issue is properly before the Court. See Pet. Cert. Reply Br. 5-10. The question whether there is a violation of any *actionable* right is necessarily subsumed within the question whether there is the violation of any right. Qualified immunity would be a largely hollow protection if government defendants were required to suffer through a trial even where it could be determined at the outset purely as a matter of law that the right allegedly violated is not actionable at all. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-528 (1985). Accordingly, as several courts of appeals have concluded, where the *Bivens* action is precluded by the availability of another remedy and the plaintiff therefore has no cause of action, the defendants are entitled to have the action against them dismissed in conjunction with their qualified immunity appeal.[4]

In *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), this Court considered whether plaintiff's claims were actionable under *Bivens* where the court of appeals had reversed the dismissal of a case on the ground of qualified immunity. In addition, in *Hartman* v.

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[4] *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1083-1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006); *Zimbelman* v. *Savage*, 228 F.3d 367, 370-371 (4th Cir. 2000); *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320 (10th Cir. 1989), cert. denied, 495 U.S. 947 (1990); see also *Meredith* v. *Federal Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1048-1052 (D.C. Cir. 1999); *Hiler* v. *Brown*, 177 F.3d 542, 544 (6th Cir. 1999). But see *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (9th Cir. 1992).

*Moore*, 126 S. Ct. 1695, 1702 n.5 (2006), the Court held that it had jurisdiction in a qualified immunity appeal to address the elements of a *Bivens* action for malicious prosecution and retaliatory prosecution, because the question of the elements of the *Bivens* claim was "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on interlocutory appeal." The same goes here, where the antecedent question is whether any *Bivens* action is available at all. If anything, the question whether there is *any* constitutional tort is even more appropriate for resolution at this stage than the "definition of an *element* of the tort." *Ibid.* (emphasis added).

2. *Bivens* is fundamentally ill-suited for claims, like respondent's, founded on the Just Compensation Clause of the Fifth Amendment. The Just Compensation Clause specifies a payment of money (or its equivalent)—*i.e.*, "just compensation"—as a condition that must be satisfied for a taking of property by the government to be lawful. Long before this Court inferred a damages remedy in *Bivens*, Congress had provided specific mechanisms (now embodied in the Tucker Act) to effectuate the constitutional guarantee of just compensation. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985); *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). There is no basis for supplanting (or supplementing) those congressionally sanctioned mechanisms with a judicially inferred cause of action for damages under *Bivens*.

A damages remedy against *individual* federal officials, moreover, is fundamentally inconsistent with the nature of the Fifth Amendment right to just compensation, which this Court has repeatedly held is a right that is owed by (and can be violated only by) *the government itself*, not by federal officials in their individual capacity. See, *e.g.*, *Hooe* v. *United States*, 218 U.S. 322, 335-336 (1910); *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920). Accordingly, all of the takings cases on which respondent relies—like all Just Compensation Clause claims before this one—involve suits against government

entities, as opposed to individual officials. See, *e.g.*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979).

Recognizing the new constitutional tort urged by respondent and his amici also would have a crippling effect on responsible land management. See Nat'l Wildlife Fed. Amicus Br. 3. Millions of acres of public lands are interspersed with private lands in the West. BLM employees thus regularly interact with private landowners over matters such as rights-of-way, grazing privileges, fish and wildlife, recreational permits, mineral and water rights, cultural resources, and other environmental concerns. BLM administers more than 21,000 grazing permits nationally, including 3500 in Wyoming. Likewise, in 2005, in Wyoming alone, over 1000 rights-of-way actions were issued, amended, renewed, or rejected by BLM. See BLM Wyoming, *2005 Annual Report to the Public*. Dispute over those actions are subject to appeal to the IBLA and a variety of other established remedies. See p. 1, *supra*. But under respondent's theory, any time a private landowner is denied a valuable privilege concerning the use of interspersed public lands (*e.g.*, a right-of-way, grazing permit, or recreational use permit), he could bypass specific administrative remedies and bring a *Bivens*-based Fifth Amendment action claiming interference with his property rights (or retaliation for exercising such rights).

3. Inferring a *Bivens* action for damages against individual government officials is unnecessary in light of the numerous statutory and administrative avenues for relief already available to property owners involved in land use disputes with BLM. For someone like respondent, it is hardly "damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). Aside from unspecified money damages, respondent's complaint sought declaratory and injunctive relief as to the scope of a particular easement, the government's right of administrative access under the grazing and recreational use permits, and the validity of certain

administrative trespass proceedings against respondent. See J.A. 81. Those claims, however, are addressed to the rights and proceedings of the government itself, and therefore are properly brought only against the government itself. In fact, each element of the requested declaratory and injunctive relief either was or could have been the subject of proceedings before BLM and the IBLA and could have been raised in judicial proceedings under the APA seeking review of those administrative decisions. Likewise, any trespass claims could have been asserted under the FTCA and any takings claims under the Tucker Act.

This Court's cases foreclose respondent's attempt to use *Bivens* to circumvent those longstanding avenues of relief expressly provided by Congress and the agency for the resolution of precisely the type of land use disputes at issue here. See *Bush* v. *Lucas*, 462 U.S. 367, 385-388 (1983); *Chilicky*, 487 U.S. at 421-423; *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67-69 (2001); see also Pet. Br. 37-40. For more than a quarter of a century, this Court has "consistently refused to extend *Bivens* liability to any new context." *Malesko*, 534 U.S. at 68; see *id.* at 78 (Scalia, J., concurring). There is no reason to backtrack here.

### B. Respondent Has Not Alleged The Violation Of Any Right Protected By The Just Compensation Clause

Respondent does not allege that any of his property rights were actually taken by the government, or that the right to just compensation guaranteed by the Fifth Amendment has otherwise been triggered by any of the regulatory actions about which he complains. To the contrary, respondent stresses that the "essence of [his] claim is *not* that he was subjected to a taking" (Br. 35 (emphasis added)), even though he also emphasizes that his Fifth Amendment claim is based on the Just Compensation Clause and not the Due Process Clause (Br. 11 n.11). At times (Br. 21-24) he characterizes the Fifth Amendment right at issue as a right against retaliation for the exercise of his "property rights," including the "right to exclude" the government from his land. At other times (Br. 24-26) he characterizes it as a right not

to be coerced into waiving his right to just compensation. Either way, the alleged right has no foundation in the text or history of the Just Compensation Clause or this Court's cases.[5]

First, although respondent repeatedly refers to his Fifth Amendment property rights, it is state law, and not the Fifth Amendment, that creates and defines substantive property rights, including the right to exclude. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984). The Fifth Amendment protects the right to exclude others, just as it does other property rights, through (and only through) its guarantee of just compensation. *Kaiser Aetna*, 444 U.S. at 176. But respondent did not exercise any Just Compensation Clause rights when he sought to exclude the government from his land by refusing to agree to a reciprocal easement, or when he complained of alleged government trespasses on his land. Rather, at most, respondent sought to exercise his state law property rights on those occasions. The Fifth Amendment protects citizens from the actual and lawful taking of such rights without "just compensation," but it does not create a constitutional tort for money damages out of any alleged wrongful interference with those rights. See Pet. Br. 41-44.

Second, whether stated as a retaliation claim or a right against coerced waiver, respondent's theory is logically inconsistent and is fundamentally at odds with the actual right protected by the Just Compensation Clause. Respondent asserts that petitioners' regulatory actions were not authorized by federal law, but that they nonetheless violated the Just Compensation Clause, and as a result, respondent has a retaliation claim for damages against the individual officials whose actions he challenges. But respondent cannot have it both ways. If petitioners'

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[5] Contrary to respondent's suggestion (Br. 26), the administrative actions at issue bear no resemblance to "military impressments of private property." Instead, what distinguishes this case is that respondent is demanding the right to use and benefit from *public* lands without agreeing to any of the obligations that traditionally have accompanied the use of such lands. Nothing in the history of the Fifth Amendment (or the Third) supports that one-sided demand.

regulatory actions were not authorized, then under this Court's longstanding case law, the United States has not violated the Just Compensation Clause, and at most respondent would have a trespass suit against the individual officials who committed the unauthorized trespasses. But if those regulatory actions *were* authorized and constituted a taking within the meaning of the Just Compensation Clause, then respondent's suit would lie solely against the United States; he could not state a constitutional claim against the individual government officials. See Pet. Br. 42-43. There is no authority for a substantive right under the Just Compensation Clause against individual officials.[6]

Third, establishing such a right against individual government officials under the Just Compensation Clause would constitutionalize routine land use disputes. Respondent bases his asserted *Bivens* action on the proposition that the "Fifth Amendment protects th[e] state law property interest from invasion in the absence of a taking for which compensation is available." Br. 28. Under that approach, any trespass by government officials on private land—or other alleged invasion of the state law right to exclude—presumably could give rise to a Fifth Amendment violation that is actionable in a *Bivens* action for money damages against individual employees. More to the point, as the allegations in this case underscore, in theory any number of legitimate regulatory actions involving the management of public lands interspersed with private lands could be framed in terms of an alleged trespass that could give rise to a *Bivens* action for money damages. The mere threat of such actions would itself skew necessary land management decisions. See p. 11, *supra*.

Fourth, the Fifth Amendment cases upon which respondent primarily relies (see Br. 23-26), most notably *Nollan* v. *California Coastal Commission*, *supra*, *Dolan* v. *City of Tigard*, *supra*,

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[6] Compensation is presumptively available under the Tucker Act for a taking. But if compensation is not available in a particular instance, then an injunction could properly issue against the government or its officers in their official capacity. See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998).

and *Kaiser Aetna* v. *United States*, *supra*, do not support his Just Compensation Clause claim, much less inferring a *Bivens* cause of action against individual government officials under that Clause. To begin with, those cases involved suits against the government itself and a claim that property had been *taken* by regulation, which is absent here. Nothing in those cases supports awarding compensatory damages against individual government officials as a means of vindicating a property owner's right to just compensation for a physical or regulatory taking of property, much less doing so where *no taking* is even alleged.

Moreover, *Nollan* and *Dolan* involved an express condition on the property owner's use of his own land. In both cases, the property owners were denied a building permit on their land unless they agreed to some form of a *public* easement. In concluding that the easement lacked an "essential nexus" to any legitimate land-use regulation, the Court expressed particular concern for cases "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan*, 483 U.S. at 841.

Here, there was no public easement (the easement was for government access only) and no express condition. The only regulatory action BLM took that can fairly be characterized as being based on respondent's refusal to grant the United States a reciprocal easement was the cancellation of a right-of-way over public land—which was conditioned on the receipt of the reciprocal easement. But, as noted, respondent has shifted his focus away from that condition (which is unquestionably appropriate, see *Kaiser Aetna*, 444 U.S. at 189). All that remains is respondent's litany of complaints about BLM's management of public lands. See Part I, *supra*. Those allegations are far afield from the express condition claims in *Nollan* and *Dolan* and, in any event, nothing in *Nollan* and *Dolan* authorizes courts to invalidate or disregard otherwise lawful administrative actions under

the Just Compensation Clause solely because of an alleged subjective intent on the part of public officials to obtain a property interest for the government.

Finally, neither the Fifth Amendment nor *Bivens* supports the creation of a personal damages action for alleged retaliation based on the administrative actions at issue. See Pet. Br. 37-40. Like the court of appeals, respondent has failed to identify any case recognizing an anti-retaliation right grounded in the Just Compensation Clause. Nor has he provided any reason to extend that doctrine to the Just Compensation Clause, which has a unique, textual incentive (the guarantee of "just compensation" for any taking) that ensures the robust exercise of Fifth Amendment rights. The First Amendment right against retaliation provides an additional protection insofar as it prevents retaliation against individuals who exercise their Fifth Amendment rights through petitions for redress. In any event, even if the Fifth Amendment did incorporate an independent right against retaliation (which has gone unnoticed for more than 200 years), the right would not protect against administrative actions—like those at issue—which do not interfere with any substantive right protected by the Just Compensation Clause.[7]

## IV. PETITIONERS ARE ENTITLED TO IMMUNITY

At a minimum, petitioners are entitled to qualified immunity from the novel RICO and Fifth Amendment damages claims asserted by respondent. Respondent devotes scarcely two paragraphs of his brief (see pp. 31, 50) to arguing that petitioners are not entitled to qualified immunity, and that passing effort does not withstand scrutiny.

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[7] Respondent suggests (Br. 23-24) that *Dolan* and *Nollan* support creation of a distinct Fifth Amendment anti-retaliation right. That is incorrect. Those decisions are grounded in the substantive protection against uncompensated takings—which respondent does not invoke here. In any event, as discussed above, *Dolan* and *Nollan* are readily distinguishable.

1. Even where an existing right is violated, a defendant is entitled to qualified immunity unless the right was "clearly established" when the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001). "It is important to emphasize that this inquiry 'must be undertaken in light of the *specific context of the case*, not as a broad general proposition.'" *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201) (emphasis added); see *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("the right * * * must have been 'clearly established' in a more particularized, and hence more relevant, sense"). Even assuming petitioners violated an existing right under RICO or the Fifth Amendment, respondent has not come close to establishing that such a right was clearly established in the "specific context of th[is] case." *Saucier*, 533 U.S. at 201.

2. No other court has held that federal officials may be liable under RICO for exercising their lawful authority in the public land management context, much less for seeking a reciprocal right-of-way on behalf of the United States. Pet. Br. 27. And the one other court of appeals that has addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair* v. *Hawke*, 314 F.3d 934, 943 (8th Cir. 2003). Respondent does not identify any other case that could have given petitioners "fair notice" that their actions could subject them to RICO liability in the situation they confronted. Indeed, respondent "accepts" that there could be no RICO violation at all if, as the court of appeals assumed, Pet. App. 17a-18a, petitioners exercised lawful regulatory authority.

Instead of making any serious attempt to show that petitioners violated a "clearly established" right under RICO, respondent contends (Br. 42-45 & n.34.) that the qualified immunity defense does not apply at all with respect to RICO. That argument was not pressed or passed on in the courts below, was not raised in the brief in opposition, and therefore is not properly

before the Court. See *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 456 (2004); Sup. Ct. R. 15.2. Respondent's attempt (Br. 42 n.34) to cloak the argument in a jurisdictional veil is unpersuasive. This Court has jurisdiction to review the court of appeals' decision that petitioners were not entitled to qualified immunity, regardless of respondent's arguments concerning the scope of that immunity as a matter of law. In any event, this belated argument is without merit.

This Court has explicitly described the reach of qualified immunity in statutory as well as constitutional terms, see *Harlow*, 457 U.S. at 818, and has held that a plaintiff seeking an exception to the qualified immunity doctrine bears a "heavy burden" because "the doctrine of qualified immunity reflects a balance that has been struck 'across the board,'" *Anderson*, 483 U.S. at 642 (citation omitted). Respondent has not met that burden here. There is no evidence that Congress intended to strip federal officials of their qualified immunity from suit under RICO. Moreover, recognizing qualified immunity in the RICO context is consistent with the policies and traditions of the common law. See *Wyatt* v. *Cole*, 504 U.S. 158, 163-164 (1992); *Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Indeed, the Court has recognized that executive officials are entitled not just to qualified—but to absolute—immunity as to much of the alleged government misconduct on which respondent's RICO claim is based (*e.g.*, allegedly false administrative charges and selective enforcement). See *Butz* v. *Economou*, 438 U.S. 478, 516-517 (1978).[8]

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[8] The courts of appeals that have addressed the question of official immunity in the RICO context have generally concluded that RICO did not abrogate the traditional common law immunities available to executive branch officials. See, *e.g.*, *Cullinan* v. *Abramson*, 128 F.3d 301, 308 (6th Cir. 1997), cert. denied, 523 U.S. 1084 (1998); *Linne* v. *Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992) (per curiam) (unpublished), cert. denied, 507 U.S. 1004 (1993); *Thillens, Inc.* v. *Community Currency Exch. Ass'n of Illinois, Inc.*, 729 F.2d 1128, 1129-1130 (7th Cir.), cert. dismissed, 469 U.S. 976 (1984).

The cases respondent cites for the proposition that the Court has been hesitant to expand the reach of qualified immunity in the Section 1983 context are inapposite because they involve private, non-governmental defendants. See Br. 43 (citing *Wyatt* v. *Cole*, *supra*; *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997)). As this Court has explained, the policy considerations that support extending the defense to government officials do not apply in the private context. See *Wyatt*, 504 U.S. at 167-168; *Richardson*, 521 U.S. at 407-412. Furthermore, although respondent suggests that qualified immunity should be inapplicable in the RICO context to the extent that the qualified immunity and merits inquiries could overlap, see Resp. Br. 45, this Court has rejected the proposition that the qualified immunity inquiry should be disregarded where the merits and qualified immunity questions overlap, see *Saucier*, 533 U.S. at 203; *Anderson*, 483 U.S. at 643, and instead emphasized the important values served by faithfully applying an independent qualified immunity inquiry.

3. Nor has petitioner shown the violation of any "clearly established" Fifth Amendment right. As respondent himself acknowledges, "there are no reported cases concerning retaliation against the exercise of Just Compensation Clause rights." Br. 31; accord Pet. App. 16a ("[N]o court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights"). Likewise, no court has ever squarely held that a Just Compensation Clause-based, Fifth Amendment claim is actionable under *Bivens*. See Pet. Br. 27-28. It follows that there is no case law applying the novel Just Compensation Clause right that respondent asks this Court to adopt in the context of the management of interspersed public and private lands. The fact that respondent has failed to show the violation of any "clearly established" Fifth Amendment right in the specific context that petitioners faced is underscored by respondent's acknowledgment that, at a minimum, the right-of-way over public land gave petitioners a "plausible basis" to insist on a reciprocal easement over private land. Resp. Br. 14.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

MARCH 2007

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No. 06-219

IN THE

# Supreme Court of the United States

CHARLES WILKIE, ET AL.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF BROOKS REALTY AND BURGETT GEOTHERMAL GREENHOUSES, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT


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## BRIEF OF BROOKS REALTY AND BURGETT GEOTHERMAL GREENHOUSES, INC. AS AMICI CURIAE SUPPORTING RESPONDENT

Brooks Realty & Advisory Group and Burgett Geothermal Greenhouses, Inc., as amici curiae, respectfully submit that the judgment below should be affirmed.[1]

## INTERESTS OF AMICI CURIAE

Amicus curiae Brooks Realty & Advisory Group is one of the nation's most successful ranching real estate developers. Founded in 1969, Brooks Realty is synonymous with the development and marketing of large ranch properties throughout the western United States, having developed nearly half a million acres of land. Brooks Realty and its subsidiaries have offices throughout the West.

As a major landowner and developer, Brooks Realty's business depends on vigorous protection of property rights, especially the right to exclude the government and the public from private property. In addition, Brooks Realty has a direct interest in ensuring that federal officials charged with federal land oversight cannot retaliate with impunity against landowners who exercise their right to exclude the government from their private property.

Amicus curiae, Burgett Geothermal Greenhouses,

[1] Pursuant to this Court's Rule 37.6, amici Brooks Realty and Burgett Geothermal Greenhouses, Inc. state that no counsel for a party authored this brief in whole or in part. No one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

Inc., is the largest employer in Hidalgo County, New Mexico and owns the largest geothermal greenhouse in the United States. Burgett ships twenty-five million roses to markets in the southwestern United States. Burgett's greenhouse complex is on privately owned land; however, the mineral rights (geothermal heat) used to heat Burgett's 30-acre greenhouse complex are owned by the federal government. Burgett leases the geothermal heat from BLM. The ownership of the mineral rights has been the subject of much litigation between Burgett and the United States. *See, e.g.*, *Burgett Geothermal Greenhouses, Inc. v. United States*, 277 F.3d 1222 (10th Cir. 2002).

Burgett has a direct interest in ensuring that BLM officials respect private property rights, including the right to exclude the government from its property. Indeed, Burgett has been subjected to retaliatory treatment, including the heavy-handed treatment that petitioners euphemistically refer to as "give and take."

## STATEMENT OF THE CASE

At bottom, this case rests on the integrity of the Fifth Amendment's protection of property rights. Do the protections afforded property owners contained in the Fifth Amendment support respondent's *Bivens* claim, or are property rights relegated to the position of a "poor relation" to other constitutional rights deemed more robust, such as First Amendment rights, which do support anti-retaliation rights? *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

Because this case arises in the posture of a motion for summary judgment, the Court is required to view all facts and draw all reasonable inferences in favor of the nonmoving party, the respondent. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

In 1994, respondent, Harvey Frank Robbins, purchased the High Island Ranch, a cattle ranch located in Wyoming, from George Nelson. There was nothing in the chain of title to suggest to respondent that the title was encumbered by an easement owned by the government. J.A. 44. Apparently, however, the Bureau of Land Management (BLM) had negotiated an agreement for an easement with Mr. Nelson, but BLM failed to record the easement before respondent purchased the property and recorded his warranty deed. The recordation of the warranty deed extinguished BLM's unrecorded easement over the property. *Id.* at 45.

Once BLM learned of its mistake in not timely recording the easement, BLM began demanding that respondent grant BLM an easement without compensation. *Id.* at 46. When respondent refused, BLM officials engaged in a series of malicious, retaliatory acts designed to extort the desired easement from respondent. For instance, they threatened to cancel a right-of-way respondent needed to access the upper portions of his Ranch. *Id.* at 64-66. Petitioners encouraged respondent's neighbor to file criminal charges against respondent. *Id.* at 68-71. BLM officials told respondent's neighbors that they were prepared to wage "a long war" that would "outlast" and "outspend" respondent. *Id.* at 132. In short, they promised to "bury Frank Robbins." *Id.* at 67.

Petitioners' conduct included numerous violations of respondent's property rights—notably the right to exclude the government from his property. The record is replete with

instances in which BLM officials simply entered onto respondent's property whenever they felt like it. *See, e.g.*, 47, 54.

Petitioners also singled out respondent and treated him differently than neighboring ranch owners. Petitioners issued citations to respondent though his neighbors were not cited in identical situations. Petitioners prosecuted respondent for frivolous livestock trespasses. *Id.* at 49. Petitioners used these trespass allegations to justify revoking respondent's grazing permits. *Id.* at 51.

In another attempt to "get [respondent's] permits and get him out of business," petitioners revoked respondent's permit to run guest cattle drives—respondent's primary source of income for the Ranch—over federal land. *Id.* at 49, 126. When respondent began operating guest cattle drives entirely on his property, petitioners interfered with those drives by trespassing onto respondent's Ranch to videotape the guests while on the cattle runs. *Id.* at 52.

After enduring years of such abuse, respondent filed suit against the BLM officials responsible for the retaliatory behavior in their individual capacities, alleging that petitioners had, among other things, engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968. Respondent also sought relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his constitutional right to exclude the government from his property.

## SUMMARY OF ARGUMENT

If the Constitution stands for anything, it stands for the proposition that government officials cannot punish or retaliate against a citizen for exercising a right secured by the Constitution. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted). In this case, the Tenth Circuit held that that the unconstitutional retaliation doctrine includes a citizen's well-established Fifth Amendment right to exclude the government from his private property. *Robbins v. Wilkie*, 433 F.3d 755, 765–67 (10th Cir. 2006).

Petitioners urge this Court to reverse this holding, asking the Court to hold that the government can retaliate against citizens who exercise their constitutionally protected right to exclude others from their property. In fact, petitioners suggest that to require BLM officials to respect private property rights, notably the right to exclude others, might "chill government officials in a broad range of appropriate and vital regulatory actions . . . ." Pet. Br. at 13.

Chilling unconstitutional behavior, of course, is exactly what the Framers of the Constitution hand in mind. As Justice Brennan explained in his famous dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1980):

> [L]and-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Such

> liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner?

450 U.S. at 661 n.26 (citations omitted). Here, we might likewise ask, why not a BLM employee? The very purpose of the *Bivens* cause-of-action against individual government employees is to chill unlawful government behavior. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

Petitioners' argument that Fifth Amendment rights are somehow either less important or less in need of protection than First Amendment rights is not consistent with the drafter's intent with respect to property rights protection. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 132 (1996) ("The United States was one of the first republics ever to enshrine freedom of speech in its Constitution, a freedom originally understood as rooted in an individual's natural property right in his information.").

Petitioners attempt to confuse the question by arguing that the unconstitutional retaliation doctrine was not clearly established in specific connection with the right to exclude. There is no more firmly established right among the bundle of rights associated with property rights protection than the right to exclude others from one's property. *See, e.g., College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others.");

*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). Therefore, as the right to exclude is clearly established, no reasonable government official would think that he could retaliate against a citizen for that citizen's exercise of his right to exclude. Accordingly, the Tenth Circuit was correct in concluding that petitioners were not entitled to qualified immunity.

The Tenth Circuit was also correct in determining that petitioners were not entitled to summary judgment with regard to respondent's allegation that petitioners' conduct violated RICO. There is no exception to the rule that the beneficiary of extortionate conduct can be a third-party for situations where the third-party beneficiary is the United States. This proposed exception is not supported by the language of the Hobbs Act, nor can petitioners cite any case so holding. Here, the conduct of petitioners was plainly wrongful and unlawful and, therefore, fits within the Hobbs Act prohibition.

There is only one constitutional way to acquire private property from a property owner not willing to enter into a voluntary agreement—through the provision of just compensation. As this Court has held in cases such as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), government actions can result in the extortion of private property from property owners. Here, petitioners could have condemned an easement under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1785, which specifically provides them with the authority they needed to acquire necessary access to public lands. Rather than utilizing their lawful powers of eminent domain, as provided for in FLPMA, petitioners chose to subject

respondent to systematic harassment, hoping to acquire an easement for free through extortion.

For all of these reasons, this Court should affirm the Tenth Circuit's denial of petitioners' motion for summary judgment.

## ARGUMENT

### I. The Fifth Amendment Protects Against Retaliation for Exercising the Right to Exclude and that Right was Clearly Established

Encountered with a campaign of threats, harassment, and intimidation launched by BLM employees to circumvent the constitutional limitations on their authority, the Tenth Circuit properly applied established legal principles in rejecting petitioners' qualified immunity defense to respondent's *Bivens* action. Petitioners have asserted that the Tenth Circuit's decision with regard to their qualified immunity from a *Bivens* claim was incorrect because, according to petitioners, the "Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of First Amendment rights." Pet. Br. at 37. Contrary to petitioners' assertion, the principle that a government official may not retaliate against a citizen for that citizen's exercise of a constitutionally protected right extends beyond the First Amendment. Thus, as the Tenth Circuit properly recognized, where there is a clearly established constitutional right, such as the right to exclude the government from one's private property, the Constitution proscribes retaliation for the exercise of that right.

Petitioners' assertion that the constitutional retaliation doctrine only applies to suits alleging retaliation for the exercise of First Amendment rights is incorrect for at least

two reasons. First, nothing in the doctrine of unconstitutional retaliation or its rationale limits the doctrine to the protection of First Amendment freedoms. Second, even if this Court were to conclude that the unconstitutional retaliation doctrine depends on the fundamental nature of the underlying right, the property rights protected by the Fifth Amendment are sufficiently robust to support the anti-retaliation right applied by the Tenth Circuit.

Moreover, the constitutional protection against retaliating for a citizen's exercise of his right to exclude is clearly established. That is, no objectively reasonable government official would believe that he could retaliate against a citizen for exercising his clearly established constitutional right to exclude the government from his property. Accordingly, as there is a clearly established right to be free from retaliation for the exercise of the right to exclude, the Tenth Circuit was correct in determining that petitioners cannot assert a defense of qualified immunity to respondent's *Bivens* action.

### A. The General Terms of the Unconstitutional Retaliation Doctrine do not Limit the Doctrine to the First Amendment

In general terms, and without reference to the First Amendment, this Court has recognized that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977). That is to say, the government may not punish or retaliate against its citizens for the exercise of their fundamental constitutional freedoms. Thus, for example, the Constitution prohibits retaliating against a criminal defendant who successfully exercises his Due Process right to appeal his conviction by imposing a greater sentence upon reconviction, *North*

*Carolina v. Pearce*, 395 U.S. 711, 725 (1969), or by reindicting the defendant on more serious charges, *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974).

Although it is true that the unconstitutional retaliation doctrine has arisen most frequently in cases involving free speech and free association, in recognizing the unconstitutional retaliation doctrine, this Court has not relied on any principle specific to the protections of the First Amendment. Rather, the Court has acted on the general principle that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S. at 363 (citation omitted); *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted). The Tenth Circuit has also relied on a general principle in unconstitutional retaliation cases in that circuit: "An action taken in retaliation for the exercise of a constitutionally protected right is actionable. . . ." *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

In short, the fact that the unconstitutional retaliation doctrine is often applied in First Amendment cases, does not mean it only applies in such cases. Where a public official misuses his power to retaliate against a citizen for exercising his property rights, there is no reason the general principle behind the unconstitutional retaliation doctrine is not broad enough to apply.

### B. Property Rights Protected by the Fifth Amendment Are Sufficiently Robust to Support an Anti-Retaliation Right

Moreover, even if this Court were to determine that the unconstitutional retaliation doctrine only applies to fundamental rights, the property rights protected by the Fifth Amendment are sufficiently robust to support an anti-retaliation right. In order to support the petitioners' notion that First Amendment rights stand above property rights, petitioners invite the Court to strip the Constitution's protections over property rights down to a mere requirement that the government provide just compensation for property actually taken. Ignoring the fundamental importance the Framers placed on property rights, petitioners assert that the Fifth Amendment does not embody an anti-retaliation right and that the unconstitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of First Amendment rights. Because the Court "has long shown a special sensitivity to the exercise of First Amendment rights" (Pet. Br. at 37), petitioners argue that the Fifth Amendment "presupposes a degree of permissible governmental interference with property rights that is wholly alien within the context of First Amendment speech rights." Pet. Br. at 39.

Petitioners' argument is flawed for three reasons. First, the First Amendment rights that petitioners concede support an anti-retaliation right are rooted in property rights protection. Thus, petitioners' alleged dichotomy between property rights and free speech rights is false. Second, the Framers intended that property rights were to be as vigorously protected as any other constitutionally protected right. Petitioners' arguments against the Constitution's robust protections of property rights put aside at least six material guarantees regarding property rights found in the

Bill of Rights alone. Finally, constitutional protection of property rights means more than just that the government must provide compensation for private property that it takes.

### 1. First Amendment Rights Are Rooted in Property Rights Protection

Petitioners argue that First Amendment rights are "supremely precious" and "delicate" and "vulnerable" and thus are afforded special protections not afforded to other constitutional rights, such as property rights. Pet. Br. at 37–38.

Petitioners' argument, however, is at odds with the property-rights pedigree of the First Amendment. As noted constitutional scholar, Professor John O. McGinnis, has observed, "[t]he United States was one of the first republics ever to enshrine freedom of speech in its Constitution, a freedom originally understood as rooted in an individual's natural property right in his information." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 132 (1996). Professor McGinnis further notes that,

> the most sophisticated philosophical defense of the Whig theory of government and the primacy of property rights, namely John Locke's Second Treatise on Government, provided direct theoretical inspiration to James Madison-the drafter of the First Amendment. Indeed, the echoes of the Second Treatise in Madison's most extensive discussion of the philosophical wellsprings of the First Amendment make it obvious that he adapted Lockean principles to defend freedom of speech on the grounds

> that it was an aspect of the individual's property right in his information.

*Id.* at 60.

James Madison, the author of the First Amendment, was explicit in his intent to link property rights with free speech protection, an understanding that should not lightly be discarded:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999).

Thus, petitioners are flat wrong in claiming that "the Fifth Amendment was not intended to encourage a particular type of expressive citizen activity that could be chilled if not robustly protected." Pet. Br. at 38. To the contrary, that is exactly what the Framers intended—to fully protect property rights, including free speech rights. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."). Simply put, property rights and personal rights cannot be disjoined. Accordingly, if censorship can create a

"chilling effect" on free speech, certainly economic retaliation can have an equal effect on property rights.

### 2. The Framers of the Constitution Intended that Property Rights Be Vigorously Protected

The position taken by petitioners in this case, that property rights should not be as robustly protected as free speech rights because property rights "presuppose[] a degree of permissible governmental interference," is supported neither by the text nor the original understanding of the Constitution. Pet. Br. at 39. The Framers realized that robust protection of property rights fortifies liberty by diffusing power and protecting individual autonomy from government control. Indeed, as understood by the Framers, personal rights, such as free speech or privacy rights, were inseparable from property rights: "Government is instituted no less for the protection of property, than of the persons of individuals." *The Federalist No. 54* (James Madison); *see also* James Madison, Speech in the Virginia Constitutional Convention, *reprinted in James Madison: Writings* 824 (Jack N. Rakove ed., 1999) ("[T]he rights of persons, and the rights of property are the objects, for the protection of which Government was instituted. These rights cannot well be separated.").

In *Lynch v. Household Finance*, 405 U.S. 538 (1972), this Court likewise stated:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a personal right,

> whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither would have meaning without the other.

405 U.S. at 552 (citations omitted); *see also* Richard A. Epstein, *Takings* 138–39 (1985) ("Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated? A country in which there is a free nationalized press?").

Thus, although the word "property" does not appear in the Preamble of the Constitution,

> the Federalist Papers make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property, the whole preamble is about protecting the citizens rights in property and property in rights.

Hon. Loren A. Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights*, 30 U. Rich. L. Rev. 1055, 1056 (1996). As constitutional scholar, Bernard H. Siegan wrote:

> Consistent with the prevailing ideas of their times, the Framers supported protection of private property rights as essential both to the fulfillment of the human condition and to the advancement of society. During the

> Constitutional Convention of 1787, Madison asserted that in civilized society the preservation of property, as well as other personal rights, was an essential object of the law. . . . A government "which [even] indirectly violates [individuals'] property in their actual possessions," concluded Madison, "is not a pattern for the United States." For him, protection of property was a necessary by-product of the freedom of action he deemed an essential part of liberty.

Bernard H. Siegan, *Property and Freedom* 14 (1997) (footnotes omitted).

Accordingly, it is no accident that the Bill of Rights contains a variety of interrelated rights (in addition to the Just Compensation Clause), a fair reading of which anchor a variety of personal liberties on the protection of property rights: the prohibition on infringing people's right to keep and bear arms (Second Amendment); the prohibition on quartering soldiers on private property (Third Amendment); the prohibition on unreasonable searches and seizures of property (Fourth Amendment); the prohibition on depriving any person of life, liberty, or property without due process of law (Fifth Amendment); the right to trial by jury for controversies exceeding twenty dollars (Seventh Amendment); and the prohibition of excessive bails and fines (Eighth Amendment). *See* Siegan, *Property and Freedom* at 20.

### 3. Constitutional Protection of Property Rights Means More Than Just That the Owner Gets Paid if the Government Interferes With His or Her Property Rights

Petitioners' suggestion that the constitutional protection of property rights only means that the government must pay the owner if the government decides to invade an owner's property rights trivializes beyond recognition the purpose behind property rights protection. The very structure of government was designed to ensure that the government would not nullify private property rights, so as to safeguard the civil liberties of the minority, or individual, against the majority:

> By consistent division of authority, the Founders sought to prevent concentration of governmental power against property rights. Under such division, the polity "will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." The very structure of government would ensure that the rights of property would not be nullified "by the superior force of an interested and overbearing majority."

Bernard Schwartz, *The Rights of Property* 21 (1965) (footnotes omitted) (quoting *The Federalist Nos. 51* and *10* (J. Madison)).

"Because the Framers greatly valued the rights of property owners, they could not have envisioned a constitutional system in which the protection of property consisted of mere legal possession stripped of economic

value." James W. Ely, Jr., *Property Rights and Judicial Activism*, 1 Geo J. L. Pub. Pol'y 125, 127 (2002). Therefore, Madison warned people against government that "indirectly violates their property, in their actual possessions, in their labor that acquires their daily subsistence. . . ." James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999). What Madison feared "was not straightforward confiscation, but more indirect infringements." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 30 (1990).

The purpose behind the inclusion of property rights protection in the Constitution was to ensure the existence of a free society. That purpose is not effectuated by merely requiring that the government provide just compensation—just compensation is only part of the constitutional protection. "Underlying all of our political and intellectual freedoms which make for a civilized society is a foundation of widely dispersed private property, and all the attributes of that system that Madison so clearly understood." Hon. Loren A. Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights*, 30 U. Rich. L. Rev. 1055, 1060 (1996). For Madison the requirement of just compensation evidenced "pride[] . . . in maintaining the inviolability of property." James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999). But more broadly for Madison, the just compensation requirement embodied a national commitment to personal freedom. Thus, "[i]n Madison's view, . . . enunciation of the just compensation principle in the Bill of Rights had extremely broad ramifications." William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 713 (1985).

### C. No Reasonable Government Official Would Think He Could Retaliate Against Respondent for Exercising His Constitutional Right to Exclude

Implicit in the concept of ownership of property is the right to exclude others. Indeed, the right to exclude is one of the most fundamental of all property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). As this Court held in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." 458 U.S. at 179–80; *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."). More recently, this Court explained in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005):

> physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering or using her property – perhaps the most fundamental of all property interests.

544 U.S. at 539.

As the right to exclude is well-recognized, it may not seriously be contended that it is not clearly established. Petitioner asserts, however, that any interference with this clearly established right short of actually taking

Respondent's property without providing just compensation is not unconstitutional such that it would support a *Bivens* action. Pet. Br. at 41–43. This is because, according to petitioner, property rights do not include a constitutional right to be free from retaliation for exercising them or, at the very least, the anti-retaliation right is not so clearly established that a reasonable government official would be aware of the right.

Petitioner's argument is incorrect in that as the right to exclude is clearly established, it is axiomatic that no objectively reasonable government official would think it was permissible to retaliate against a citizen for that citizen's exercise of the right to exclude. "It is well-established that a public official may not misuse his power against an individual for the exercise of a valid constitutional right." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An action taken in retaliation for the exercise of a constitutionally protected right is actionable. . . ."). Thus, it is clearly established that the property rights protection afforded by the Fifth Amendment includes the right to exclude, and it is clearly established that public officials may not retaliate against a citizen for the exercise of constitutional rights. Therefore, by deduction, the right to be free from retaliation for exercising the right to exclude is clearly established. Accordingly, as government officials are not entitled to qualified immunity for violating clearly established rights, petitioners do not have a qualified immunity defense to respondent's *Bivens* claim.

Although it is true that retaliation has to this point arisen most frequently in cases involving the First Amendment, there is no reason why the unconstitutional retaliation doctrine should not apply equally to all fundamental constitutional rights. As explained above,

property rights are every bit as fundamental as the First Amendment rights petitioners hold so sacrosanct. In fact, as discussed above, First Amendment rights are rooted in property rights protection and there is no meaningful way to distinguish between personal liberties and property rights. With this in mind, it is clear the general language of the rule against retaliation quoted above—it is well-established that a public official may not misuse his power against an individual for the exercise of a valid constitutional right—should apply as equally to the Fifth Amendment as it does to the First Amendment.

Embedded in petitioners' argument that only the First Amendment supports an anti-retaliation right is an assertion that the Tenth Circuit's analysis in this case is illegitimate judicial activism. However, the Tenth Circuit's recognition that retaliation may affect a citizen's property rights to the same degree as a citizen's First Amendment rights is but a modest step toward according property rights the same degree of judicial solicitude as other provisions of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

## II. Government Officials Can Be Guilty Under RICO for the Predicate Act of Extortion if Their Actions Take Private Property Rights Without Payment of Just Compensation

Petitioners are mistaken in their belief that the Fifth Amendment's protection of private property rights does not forbid the government (and its employees) from extorting private property from its citizens. Pet. Br. at 18–24. The

Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(a). Extortion under color of official right, is defined as "the use by a public official or employee of the power or authority of the office [he or she] occupies in order to obtain money, property, or something of value from another to which that government official or employee or *that government office have no official right.*" 2A K. O'Malley, et al., *Federal Jury Practice & Instructions* § 53.09 (5th ed. 2006) (emphasis added).

Here, petitioners assert that their actions do not fit within the Hobbs Act framework for two reasons. First, petitioners assert that "an extortionist must actually obtain the victim's property for himself or another *private party.*" Pet. Br. at 19 (emphasis added) (internal quotations omitted). Second, petitioners assert that the petitioners "did not seek anything that was 'not due' to the government" and, therefore, there was nothing unlawful about their actions. Pet. Br. at 21. Neither of these reasons exculpates petitioners' conduct in this case.

### A. Petitioners' Conduct Constitutes Extortion Even if the United States Was the Intended Beneficiary

Contrary to petitioners' assertions, there is no compelling reason to exonerate petitioners' extortionate conduct simply because they sought the property at issue for the United States. This Court has previously held that "extortion as defined by the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). In other words, in determining whether an action is extortionate, the Court must recognize that the "gravamen of the offense is loss to the victim," *United States v. Frazier*,

560 F.2d. 884, 887 (1977), not the identity of the beneficiary. It is irrelevant under the Hobbs Act whether petitioners were motivated by an economic purpose; the text of the Hobbs Act contains no requirement of an economic motive. The definition of extortion under color of authority quoted above indicates this result explaining that the use of power or authority to obtain property for a "government office" constitutes extortion. *Federal Jury Practice & Instructions* § 53.09.

Were it otherwise, government officials and employees could hijack property owners under color of official right and not be guilty of extortion simply because the intended beneficiary was the United States. Extortion recognizes no exception, however, for the United States as the beneficiary of the extortionate action. Indeed, this Court and others have applied the concept of extortion to attempts to obtain property for the benefit of the government in a number of similar contexts. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

### B. Petitioners' Actions Were "Wrongful" or "Unlawful" and, Therefore, Constitute Extortion

Petitioners concede that, properly construed, the Hobbs Act is violated upon the *unlawful* taking of property under color of official right: the Hobbs Act covers "those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Enmons*, 410 U.S. 396, 400 (1973). Yet, that is exactly what has occurred here (or at least it is exactly what would have been the result of petitioners' actions had their scheme to extort an easement from respondent been successful). There is only one lawful

way for the government to take property—through providing just compensation. Anything short of providing just compensation to a property owner unwilling to part with his property is unconstitutional and, therefore, *unlawful*. As the taking of private property by the government without the payment of just compensation is unlawful or wrongful, by petitioners' own argument their actions constituted extortion.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court held that government officials can, even if carrying out otherwise legitimate public purposes (such as protecting visual access to the ocean), engage in actions so "completely adrift from [their] constitutional moorings" that those actions constitute "out-and-out extortion." *Id.* at 387 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981) (stating that government officials "have a constitutional duty" to protect property rights and they "may not attempt to extort from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation"); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.").

Thus, this Court has observed on a number of occasions that, "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

*Dolan*, 512 U.S. at 396 (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922)).

In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), this Court likewise faced an effort by the government to acquire an easement from a private landowner that refused to grant the easement to the United States:

> After negotiation with these owners failed, the Government cleared a dirt road extending from a local county road to the reservoir across both the public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

*Id.* at 678.

The private landowner filed a quiet title action and this Court held that the government did not retain an implied access right across private property to reach its land, which was arranged in the checker-board configuration. Accordingly, the Court explained, the government was required to purchase any rights-of-way it wished to acquire. *Id.* at 687 ("When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased."). Moreover, the Court stated that the private landowner was well within its rights to refuse to grant a right of way to the government unless the government paid just compensation. *Id.* at 686. The *Leo Sheep* Court held that the federal government was not entitled to claim an implied easement because the government's inherent power of eminent domain eliminates any need for an implied easement. That is, if the government needs access, it can always condemn a right-of-way. *Id.* at 680. ("Jurisdictions have generally seen eminent

domain and easements by necessity as alternative ways to effect the same result.").

Here, petitioners made no offer to purchase the access rights that the government wished to acquire from respondent. Rather, once respondent made clear that he would not transfer a public easement to the BLM (without payment of just compensation), petitioners embarked on a scheme to extort the property interest from respondent. *See, e.g.*, J.A. at 37.

The record shows that far from the innocuous "sort of give and take that is customary between neighboring landowners" that petitioners describe, Pet. Br. at 14–15, petitioners engaged in a concerted effort to obtain respondent's property rights by a shorter cut than the well-established constitutional way of paying for the property that the government seeks to acquire.

The government not only has a constitutional duty to purchase property that it desires and cannot acquire through voluntary agreement, the government, as a sovereign, has the ultimate right to acquire any property that it deems important to achieving a legitimate public purpose through its power of eminent domain. *Kelo v. City of New London*, 545 U.S. 469, 126 S. Ct 2655 (2005); *see also United States v. Carmack*, 329 U.S. 230, 236 (1946) ("If the United States has determined its need for certain land for a public use that is within its federal powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will."). The power of eminent domain is vested in the legislative branch, with oversight and review by the judicial branch. *Kelo*, 126 S. Ct. at 2664 ("For more than a century, our

public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."); *United States v. Parcel of Land with Improvements Thereon in Square South of 12*, 100 F. Supp. 498, 504 (D.C.D.C. 1951) ("While the power of eminent domain is an inherent right of sovereignty, it is not open to question that such power lies dormant until legislative action is had pointing out the occasions, modes, agencies and conditions for its exercise.").

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1785, specifically authorizes the federal government to acquire (including through condemnation) access rights to public lands when necessary:

> Notwithstanding any other provisions of law, the Secretary, with respect to the public lands and the Secretary of Agriculture, with respect to the acquisition of access over non-Federal lands to units of the National Forest System, are authorized to acquire pursuant to this Act by purchase, exchange, donation, or eminent domain, lands or interests therein: Provided, That with respect to the public lands, the Secretary may exercise the power of eminent domain only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose.

43 U.S.C. § 1715(a). Accordingly, rather than engaging in the systematic harassment of respondent, the only lawful avenue petitioners had to acquire an easement from respondent (who was unwilling to enter into a voluntary

agreement) was to acquire the easement through FLPMA. Rather than using the authority granted to petitioners in FLPMA, however, petitioners wrongfully and unlawfully attempted to extort an easement from respondent.

## CONCLUSION

For all of these reasons, the decision by the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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February 20, 2007

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No. 06-219

# In The
# Supreme Court of the United States

CHARLES WILKIE, *et al.*,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## *AMICUS CURIAE* BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT


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## QUESTION PRESENTED

*Amicus Curiae* Mountain States Legal Foundation will address the following Question Presented:

> Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

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## *AMICUS CURIAE* BRIEF

Mountain States Legal Foundation respectfully submits this *amicus curiae* brief in support of Respondent. Pursuant to Supreme Court Rule 37(3)(a) this *amicus curiae* brief is filed with the written consent of all the parties.[1]

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF has represented parties before this Court seeking to preserve the Constitution's equal protection guarantees, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and has participated as an *amicus curiae* to ensure that the Fifth Amendment is properly interpreted so as to preserve private property rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), *amicus curiae* represents that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus curiae* and its members, made a monetary contribution for the preparation or submission of this brief.

More importantly, as it relates to the instant case, the majority of MSLF's 13,000 members own property and/or operate businesses in the western United States. Many of these members own real property that is adjacent to, or surrounded by, federal lands. Many of MSLF members are also actively engaged in livestock, oil and gas, mining, and timber operations on federal lands – these businesses are the cornerstones of western rural economies and form the foundation for the way of life in the West. Because MSLF's members have to deal with employees of the federal land management agencies on a daily basis, they are extremely concerned about the potential for abuse if Petitioners' theories are adopted by this Court. Indeed, if Petitioners' theories are adopted, employees of federal land management agencies will be able to eviscerate the property rights of MSLF's members with relative impunity.

## STATEMENT OF THE CASE

Petitioners are seeking review of an interlocutory decision by the Tenth Circuit that affirmed the District Court's denial of Petitioners' motion for summary judgment. Pet. App. at 26a. The District Court ruled that Respondent had submitted sufficient evidence to support his allegations that Petitioners retaliated against him for exercising his right to exclude. Pet. App. 37a-39a, 46a-47a. On appeal, the Tenth Circuit agreed that Petitioners were not entitled to qualified immunity, at the summary judgment stage, as to Respondents' Fifth Amendment *Bivens* claim. Pet. App. 10a-16a. In so doing, the Tenth Circuit recognized that the "right to exclude the government from one's private property" is "'a fundamental element of the property right.'" *Id.* at 12a (quoting *Kaiser Aetna v. United*

*States*, 444 U.S. 164, 178-80 (1979)). The Tenth Circuit then concluded: "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. Thus, the Tenth Circuit held that Respondent has a Fifth Amendment right to prevent the government from taking his property when the government is not exercising its eminent domain power. *Id.* at 14a-15a. Finally, the Tenth Circuit concluded there was sufficient evidence that Petitioners' retaliatory actions violated the clearly established right to exclude. *Id.* at 15a-16a.

## SUMMARY OF ARGUMENT

The issue here is whether employees of the Bureau of Land Management ("BLM") should have known that it was improper to retaliate against a property owner, through a campaign of threats, harassment, and intimidation, in an attempt to coerce him into relinquishing his right to exclude the government from his private property. The Framers of the Constitution recognized that private property is essential to a free society. By safeguarding private property, the Framers believed that all other individual liberties would be protected.

The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Property owners may assert the right to exclude against friends and strangers, and, most importantly, against the government. This right is so well established that every schoolchild knows of its existence. In fact, it would seem that "Keep Out – Private Property"

has been scratched, scribbled, or otherwise affixed upon the bedroom door, tree house, or "secret hideaway" of nearly every child in America.

It is just as well established that the government may not retaliate against its citizens for exercising their legal rights. This prohibition against retaliation applies to rights protected by the Sixth Amendment, the First Amendment, and, most importantly, the Fifth Amendment. It simply stretches credulity for Petitioners to come before this Court and suggest that they were unaware that they could not retaliate against Respondent for exercising his right to exclude the government from his property.

## ARGUMENT

### I. THE RIGHT TO EXCLUDE THE GOVERNMENT FROM ONE'S PROPERTY IS WELL ESTABLISHED.

#### A. Private Property Protects All Individual Liberties.

The origin of property rights in America may be traced to the *Magna Carta* (1215). *See, United States. v. Lee*, 106 U.S. 196, 228 (1882). Chapter 39 of the *Magna Carta* provides: "[n]o freeman shall be taken or imprisoned, or disseised . . . unless by the lawful judgment of his peers, or by the law of the land." Thus, the *Magna Carta* secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed. 1998) (hereinafter "*The Guardian of Every Other Right*"). Importantly, the early American colonists believed the *Magna Carta* to be

part of their birthright as English subjects. *Id.* For example, in 1687, William Penn advised the colonists "not to give away any thing of *Liberty* and *Property* that at present they do . . . enjoy." *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (Philadelphia, William Bradford 1687)) (emphasis in original).

In 1690, John Locke published his famous *Second Treatise of Government*, in which he contended that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property rights. John Locke, *Second Treatise of Government*, §§ 123-131 (C. B. Macpherson ed., 1980) (1690). According to Locke:

> [P]rivate property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty. . . . Because the ownership of property was a natural right, the powers of government were necessarily limited by its duty to safeguard property.

*The Guardian of Every Other Right,* at 17. Evidently influenced by Locke, "colonial leaders viewed the security of property as the principal function of government." *Id.* at 28. In fact, Thomas Jefferson incorporated the compact theory of Locke into the *Declaration of Independence*. *Id.* at 29.

The Framers of the Constitution also recognized that "principles of good government started with the protection of private property – that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law:*

*Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." *The Guardian of Every Other Right,* at 43 (quoting 1 *The Records of the Federal Convention of 1787,* at 534 (Max Farrand ed. 1937)). Alexander Hamilton stated: "One great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention of 1787,* at 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

In 1790, John Adams proclaimed: "[p]roperty must be secured or liberty cannot exist." *Id.* (quoting *Discourses on Davila, in* 6 *The Works of John Adams,* 280 (Charles Francis Adams ed. 1851)). The next year, the Fifth Amendment became effective and expressly incorporated into the Constitution Adams' belief that property is fundamental to liberty. As finally adopted:

> [T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

*The Guardian of Every Other Right,* at 54 (emphasis added).

For over 200 years this Court has consistently recognized that private property is essential to a free society. In 1897, for example, Justice John M. Harlan declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. *Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citzen* [sic]."

*Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, 235-236 (1897) (citations omitted) (emphasis added). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to

> liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (citations omitted).

Accordingly, "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *The Guardian of Every Other Right,* at 26 (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* at 14 (New York 1775)).

### B. The Right To Exclude Is The "Essential Stick" In The Bundle Of Rights That Comprise Property.

The term "property" in the Fifth Amendment is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Instead, the term includes the entire "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* In accordance with this interpretation, this Court has held that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Indeed, as Justice Brandeis explained: "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *International News Service v.*

*Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). That the right to exclude is "one of the most treasured strands in [a property] owner's bundle of rights[,]" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), is based upon the simple principle that without the right to exclude, private property would not exist. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998). Thus, the right to exclude may not only be the "essential stick" in the bundle of rights that comprise property, it may be the "*sine qua non*" of property. *Id.*

This conclusion is fully supported by Wyoming law. *See, Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source" such as state law). Ownership of property in Wyoming includes the right to defend that property. *Cross v. State*, 370 P.2d 371, 376-377 (Wyo. 1962) (the right to defend one's property is guaranteed under Wyoming's Constitution). The right to defend one's property has long been recognized at common law and is deeply rooted in the legal traditions of this Nation. *Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting from denial of *certiorari*). Because a person in Wyoming has the right to defend his property, that person has a concomitant right to exclude. *Sammons v. American Automobile Ass'n*, 912 P.2d 1103, 1105 (Wyo. 1996) (Ownership of property in Wyoming "includes the right to exclude others; that is, a true owner of land exercises full dominion and control over the land and possesses the right to expel trespassers."); *Mayland v. Flitner*, 28 P.2d 838, 848 (Wyo. 2001).

### C. The Right To Exclude Applies Against The Government.

The right to exclude is well established in the history of this Nation and, in particular Wyoming. This right allows a property owner to exclude friends, strangers, and, especially, the government.[2] *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991); *United States v. Kara*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring) ("The owner of property, of course, has a right to exclude from it all the world, including the government, and a concomitant right to use it exclusively for his own purposes."); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 63-66 (1985). In fact, those legitimate expectations of privacy that receive Fourth Amendment protection against governmental searches and seizures are based, in part upon a person's fundamental right to exclude the government from his property. *Rakas v. Illinois*, 439 U.S. 128, 143, n.12 (1978). Thus, if the right to exclude is to have any meaning, this Court must stringently apply it against the government:

> The intruder who enters clothed in the robes of authority in broad daylight commits no less an

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[2] The only case that has suggested that the right to exclude is not absolute is *PruneYard Shopping Center v. Robins*, 47 U.S. 74 (1980). In that case, this Court upheld a state constitutional provision that prohibited owners of shopping centers from excluding individuals who wished to exercise their First Amendment rights on shopping center property. *Id.* at 82-85. This Court later explained that the basis of this holding was that "the owner had not exhibited an interest in excluding all persons from his property." *Loretto*, 458 U.S. at 434. Thus, at most, *PruneYard* should be construed as an attempt by this Court to resolve a conflict that arose after the owner had previously waived his right to exclude. *See*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. at 735, n.16.

> invasion of these rights than if he sneaks in in the night wearing a burglar's mask. *In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.*

*Hendler*, 952 F.2d at 1377 (emphasis added).

## II. GOVERNMENT RETALIATION AGAINST THE EXERCISE OF THE RIGHT TO EXCLUDE IS PATENTLY UNCONSTITUTIONAL.

### A. The Prohibition Against Government Retaliation Is Well Established.

It is well established that the government may not retaliate against a person for exercising a legal right. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1977) ("[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n.20 (1973)); *see also, Shapiro v. Thompson*, 394 U.S. 618, 631 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974). Although this protection against governmental retaliation is not expressly referred to in any Constitutional provision, it exists nonetheless because retaliation inhibits or chills the exercise of legal rights. *See, Pickering v. Board of Education of Township High School*, 391 U.S. 563, 574 (1968).

### B. The Prohibition Against Government Retaliation Applies To All Rights.

Although Petitioners concede that individuals have a right against government retaliation, they curiously argue that the anti-retaliation doctrine protects only First Amendment rights. Brief for the Petitioners at 37 ("This Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of *First* Amendment rights.") (emphasis in original). Granted, most retaliation cases arise in the First Amendment context. *See, e.g., Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695, 1701 (2006); *Myers v. Connick*, 461 U.S. 138, 142 (1983); *Pickering*, 391 U.S. at 574. However, contrary to the argument of Petitioners, the anti-retaliation doctrine is not limited to First Amendment rights. Instead, the doctrine applies to all rights.

In *United States v Jackson*, 390 U.S. 570 (1968), this Court held unconstitutional the capital punishment provision of the Federal Kidnapping Act. This provision allowed the death sentence to be imposed only if the jury recommended such a sentence. *Id.* at 570-571. If the defendant pled guilty or waived his right to a jury trial, however, the death sentence could not be imposed. *Id.* The defendants argued that this provision was unconstitutional because, by allowing only a jury to impose the death sentence, it "discourage[d]" or "chill[ed]" the exercise of their Sixth Amendment right to a jury trial. *Id.* at 581. In short, the defendants argued they could either exercise their Sixth Amendment right and risk a death sentence or relinquish their Sixth Amendment right and avoid that risk. *Id.*

The government defended the provision by arguing it "ameliorat[ed] the severity of the more extreme punishment that Congress might have wished to provide[,]" *i.e.*, a mandatory death sentences in every case. *Id.* at 581-582. This Court easily rejected that argument:

> [W]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand [a] jury trial. . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, *Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.*

*Id.* at 582-583 (internal citations and footnotes omitted) (emphasis added).

The next year, this Court was faced with the issue of whether a criminal defendant could be subjected to a greater punishment after a successful appeal and then a conviction after retrial. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Although this Court concluded that such a harsher sentence was not absolutely precluded by the Constitution's protection against double jeopardy or its guarantee of equal protection, it emphasized that retaliatory "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.* at 724. Specifically, this Court ruled:

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

*Id.* at 725. In order to assure the absence of a retaliatory motivation, this Court concluded:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear [in the record]. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

*Id.* at 726. By imposing this duty, this Court sought to prevent retaliation by trial judges against criminal defendants who exercised their appeal rights.

Five years later, this Court extended the anti-retaliation principles in *Pearce* to prosecutors. In *Blackledge v. Perry*, 417 U.S. 21, 22 (1974), the defendant was convicted of assault in an inferior court having exclusive jurisdiction over misdemeanors. The court imposed a six-month sentence. *Id.* Under North Carolina law, the defendant had an absolute right to a trial *de novo* in the superior court, which possessed jurisdiction over felonies. *Id.* After the defendant filed his notice of appeal, the prosecutor then obtained a felony indictment charging him with

assault with a deadly weapon. *Id.* at 23. This indictment covered the same conduct for which the defendant had been tried and convicted in the inferior court. *Id.* Subsequently, the defendant pleaded guilty to the felony and was sentenced to a term of five to seven years in prison. *Id.*

In reviewing the defendant's felony conviction and increased sentence, this Court stated that the essence of the holding in *Pearce* was that the Constitution's guarantee of due process of law is not offended by all increases in punishment upon retrial after a successful appeal. *Id.* at 27. Instead, due process of law is only offended by those increases in punishment that may have been the product of "vindictiveness" against a defendant for exercising his rights. *Id.* Because a prosecutor in the North Carolina system would have "a considerable stake in discouraging convicted misdemeanants from appealing" in light of the increased expenditures involved in a trial *de novo*, this Court held that prosecutors could not bring more serious charges against defendants who exercise their statutory right to appeal. *Id.* at 27-29.

Accordingly, the decisions in *Jackson, Pearce,* and *Blackledge* reflect a recognition by this Court of the simple proposition that the government may not "punish a person because he has done what the law plainly allows him to do. . . ." *Bordenkircher*, 434 U.S. at 362. This prohibition against government retaliation applies whether a person is exercising a constitutional or statutory right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."). Thus, Petitioners' argument that the prohibition against government

retaliation applies only to First Amendment rights is simply wrong.

### C. The Fifth Amendment Prohibits The Government From Retaliating Against The Exercise Of The Right to Exclude.

Petitioners concede that Respondent has a right to exclude the government from his property. Brief for the Petitioners at 41 ("It is common ground that individuals possess a 'right to exclude' others – including the government – from their property."). Under this Court's anti-retaliation doctrine, it is "patently unconstitutional" for government agents to retaliate against a person for exercising a legal right. *Chaffin*, 412 U.S. at 32-33, n.20; *Goodwin*, 457 U.S. at 373. The District Court ruled that Respondent had submitted sufficient evidence, at the summary judgment stage, to support his allegations that Petitioners retaliated against him for exercising, what Petitioners concede is, a well-established right. Pet. App. 37a-39a, 46a-47a. This ruling was not disturbed by the Tenth Circuit, Pet. App. 10a-12a, and Petitioners are not challenging that result. *See* Brief for the Petitioners at I. These factors, in and of themselves, prove that Respondent should have the opportunity to prove his *Bivens* claim at trial.

In an effort to avoid this obvious result, Petitioners argue that the Fifth Amendment does not protect against government retaliation for the exercise of property rights. Brief for the Petitioners at 37. Instead, Petitioners argue that the Fifth Amendment guarantees only the payment of just compensation upon the taking of property. *Id.* at 41. Because the Fifth Amendment guarantees only the payment of just compensation upon the taking of property,

Petitioners contend that Respondent's sole remedy for the alleged Fifth Amendment violation is to seek just compensation under the Tucker Act, 28 U.S.C. § 1491, "once a taking has occurred." Brief for the Petitioners at 37-43. In short, Petitioners contend that there will be no Fifth Amendment violation until they succeed in acquiring an ownership interest in Respondent's property and refuse to pay just compensation. *Id.* at 43.

The flaws with Petitioners' argument are numerous. First, if Petitioners succeed in extorting an easement across Respondent's property, the United States would argue, in any subsequent Tucker Act case, that there was no taking. *See, Norman v. United States*, 429 F.3d 1081, 1087-1089 (Fed. Cir. 2005) (voluntary transfer of title precludes takings claim). Thus, under Petitioners' interpretation, the Fifth Amendment neither protects a property owner from governmental attempts to extort an ownership interest in the property nor provides a remedy if the government is successful in extorting that interest. The Framers of the Constitution would be shocked to know this is how the government they created treats its citizens.

Second, Petitioners' argument confuses the issue because it focuses exclusively on the Takings Clause of the Fifth Amendment. Petitioners concede that Respondent's *Bivens* claim is brought under the Fifth Amendment. Brief for the Petitioners at 41 (Respondent's "*Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment."); *id.* at 34 ("[R]espondent's complaint states only a single *Bivens* claim predicated on an alleged violation of the Fifth Amendment.") (citing Joint App. 78-79). The Fifth Amendment, of course, includes both the Due Process Clause and the Takings Clause. The Due Process

Clause certainly protects Respondent from retaliation by Petitioners for exercising his right to exclude. *See Pearce*, 395 U.S. at 725 ("Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."); *Blackledge*, 417 U.S. at 27-29 (principles of due process are offended when prosecutors retaliate against defendants who exercise their statutory rights to appeal).

Finally, even if the Due Process Clause is removed from the equation, the Takings Clause, in and of itself, protects against governmental retaliation for exercising property rights, including the right to exclude. *See Dolan*, 512 U.S. at 392 (There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as [other Amendments], should be relegated to the status of a poor relation. . . ."). Indeed, "[t]he reason why . . . retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 589, n.10 (1998) (citing *Pickering*, 391 U.S. at 574). Thus, "[r]etaliation is . . . akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Id.* (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). In *Sinderman*, a teacher in the Texas state college system alleged that the State declined to renew his contract in retaliation for statements he made that were critical of the Board of Regents. 408 U.S. at 594-595. This Court held that, if the teacher's allegations were true, the State's retaliatory action would be unconstitutional under the doctrine of "unconstitutional conditions":

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the

> government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

*Id.* at 597-598.

Although *Sinderman* is a First Amendment case, this Court has frequently used the doctrine of "unconstitutional conditions" in its Takings Clause jurisprudence. *See Dolan*, 512 U.S. at 385. For example, in *Nollan*, 483 U.S. at 836-837, the California Coastal Commission sought to condition the issuance of a building permit on the property owners granting a public easement across their land. In effect, the Commission wanted the property owners to relinquish their fundamental right to exclude, *id.* at 831-832, in exchange for exercising another fundamental property right – the right to build. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (indicating that the right to build habitable structures on land is an "essential use" of land). Because there was no "essential nexus" between the easement demanded and the permit requested, the Commission's demand that the property owners relinquish their fundamental right to exclude in exchange for a building permit was "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (quoting *E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981), *overruled on other grounds*, *Town of Auburn v. McEvoy*, 533 A.2d 317, 320-321 (N.H. 1988)). If the Takings Clause, as made applicable to the States through the

Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980), barred the California Coastal Commission's attempt to extort the right to exclude in *Nollan*, *a fortiori*, the Takings Clause bars Petitioners from retaliating against Respondent for exercising that same right.

## CONCLUSION

The Framers believed that private property is an indispensable component of a free society. The right to exclude is the "essential stick" in the bundle of rights that comprise private property. Petitioners pay "lip-service" to the right to exclude by contending that government employees may retaliate against the exercise of that right with impunity. This Court must reject Petitioners' attempt to further relegate property rights below other constitutional rights by affirming the decision of the Tenth Circuit and, thereby, allowing Respondent an opportunity to prove his *Bivens* claim at trial.

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Dated: February 20, 2007

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No. 06-219

IN THE

# Supreme Court of the United States

CHARLES WILKIE, ET AL.,
*Petitioners,*

v.

HARVEY FRANK ROBBINS,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE NATIONAL WILDLIFE FEDERATION, PUBLIC LANDS FOUNDATION, AND WYOMING WILDLIFE FEDERATION AS *AMICI CURIAE* SUPPORTING PETITIONERS


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IN THE

# Supreme Court of the United States

No. 06-219

CHARLES WILKIE, ET AL.,
*Petitioners*,

v.

HARVEY FRANK ROBBINS,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE NATIONAL WILDLIFE FEDERATION, PUBLIC LANDS FOUNDATION, AND WYOMING WILDLIFE FEDERATION AS *AMICI CURIAE* SUPPORTING PETITIONER

### INTERESTS OF *AMICI*

*Amicus curiae* the National Wildlife Federation (NWF) is a private not-for-profit conservation education organization dedicated to the wise use of our Nation's natural resources.[1] NWF has members in all fifty states, including members who live in Wyoming. NWF's members use the public lands and

[1] Pursuant to Supreme Court Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. See S.Ct.R. 37.3(a).

actively participate in public lands management issues. NWF has worked for years for responsible management of the public lands.

*Amicus curiae* the Public Lands Foundation (PLF) is a national non-profit, 501(c)(3) organization now in its 20th year of operation since being incorporated in the State of Virginia. Its more than 1000 volunteer members are retired former Bureau of Land Management (BLM) employees representing an extensive, broad cross-section of knowledge and expertise in the management of all the multiple uses of public lands. The majority of the membership are former District Managers, State Directors and Natural Resource Specialists. The mission of the Foundation is to support professional management of the public lands by professionals, and the Foundation is dedicated to the ecological stability of the public lands managed by the BLM.

*Amicus curiae* the Wyoming Wildlife Federation (WWF) is Wyoming's largest and oldest statewide sportsmen's conservation organization. The Wyoming Wildlife Federation works for hunters, anglers, and other wildlife enthusiasts to protect and enhance habitat, to perpetuate quality hunting and fishing, to protect citizen's rights to use public lands and waters, and to promote ethical hunting and fishing.

*Amici's* interests lie neither with the government nor with landowners in particular, but with the responsible management of public lands. *Amici* are thus in a balanced position, as *amici curiae*, to address the proper scope and limits of private rights of action as applied to public officials' negotiations with others over property rights.

## STATEMENT

The decision below creates new private damages actions under the Hobbs Act against individual government employees for actions taken in the exercise of lawful regulatory authority, based solely on the plaintiff's subjective

claims of extortionate intent. The decision also makes available against individual government employees a *Bivens* cause of action to enforce the newly crafted Takings Clause-based right to be free from retaliation for attempts to exclude the government from private property. If not reversed, the court of appeals' decision may create an opportunity for persons subject to regulation to bypass statutory and regulatory mechanisms established for administrative and judicial review of regulatory actions, and will create a powerful incentive for federal officials to refrain from zealously carrying out their regulatory duties due to the threat of personal liability.

## SUMMARY OF ARGUMENT

The Tenth Circuit erroneously created a new private RICO action against government officials performing their statutory and regulatory duties. After *Robbins*, a government official exercising his or her statutory duties in a property dispute may be personally liable for treble RICO damages if the official acted with an "intent to extort." Pet. App. 18a. Incredibly, an official performing only lawful actions will be labeled as a racketeer *based solely on his alleged motive for performing the lawful actions*. If left unchecked, the end result of *Robbins* will be the punishment of government officials who, within the scope of their authority, aggressively perform their jobs. Congress could not have intended—or even imagined—that result.

Before *Robbins*, extortion under color of official right occurred when a government official took property without lawful authority to do so, or took property using wrongful means—such as threats, violence, or other force. Absent performing a wrongful action, a government official was not an extortionist.

Further, before *Robbins*, government officials enjoyed a qualified immunity insulating their discretionary actions from

personal liability so long as their actions did not violate clearly established law. Qualified immunity struck a balance between citizens' rights and the officials' entitlement to perform their jobs free from undue outside influences. But then came *Robbins*, which, through a single, improper act of judicial legislation, upset this carefully constructed balance.

After *Robbins*, a government official exercising regulatory authority is an extortionist if the official performs his duties with an "intent to extort." In other words, the official's subjective motive, rather than objective actions, is the dispositive object of inquiry. *Robbins* extortion may be found not only when a government official takes (or attempts to take) property, but also when a government official withholds the granting of a reciprocal easement onto government property. An aggressive official duly performing his or her job will be personally liable for extortion, yet the underachieving official will be rewarded. This perverse result cannot be condoned by the Court.

This "intent to extort" test is erroneous for two reasons. First, the court of appeals improperly injected motive as a dispositive element of extortion. This judicial legislation is particularly appalling because the predicate for petitioners' RICO liability is a finding of extortion based on the Hobbs Act—a criminal statute. Thus, the *Robbins* extortion created by the Tenth Circuit is a basis for both civil and criminal liability. Yet creating criminal liability is the province of the legislature, not the judiciary. Second, a finding of an "intent to extort" is a purely factual and subjective inquiry devoid of an objective analysis of unlawful actions. In short, an official is an extortionist if he believes himself to be one; otherwise he is not. This nebulous and circular definition of extortion fails to provide reasonable and intelligible standards to guide officials as to what actions are legal or illegal, and should be eradicated by the Court.

The court of appeals compounded its error by finding that *Robbins* extortion was "clearly established" law at the time the petitioners took the allegedly extortionate actions. Pet. App. 22a. To the contrary, what was clearly established law was that extortion was based on unlawful predicate acts. No reasonable government official would have known—let alone imagined—that lawful actions performed under regulatory authority during the course of one's job would have constituted extortion. Thus, even assuming *Robbins* extortion is good law today (which it is not), it certainly was not clearly established law when the petitioners took the actions that formed the basis of this suit.

The creation of *Robbins* extortion will chill a governmental official's ability to aggressively perform his or her job in a property dispute. The court of appeals' decision ensures that a government official will face personal liability based only on an allegation of an "intent to extort." Knowing that the end result of a decision may ultimately be an allegation of extortion, a government official will be reticent—if not downright afraid—to perform job duties in property disputes. And this decision will potentially reach well beyond real property disputes, including, among others, disputes involving Internal Revenue investigations and claims of patent, copyright, and trademark infringement.

But the court of appeals did not stop there; indeed, its decision on respondent's *Bivens* claim will only exacerbate the chilling effect of its RICO holding. Stunningly, the court of appeals accepted respondent's claim that, under the Takings Clause, he had a constitutional "right to exclude" the government from his property and a constitutional right to be free from retaliation for the exercise of his Takings Clause-based "right to exclude." And even though the court of appeals had never recognized either the underlying Takings Clause right or an anti-retaliation right for the Fifth Amendment generally, the court further held that such

rights were "clearly established law," vitiating the petitioners' immunity. Moreover, the court of appeals created *Bivens* liability for individual federal officers for its newly crafted right without any regard to the pre-defined remedy for Takings Clause violations set forth in the Constitution and made available against the United States by statute.

These holdings lack any basis in precedent. It is black-letter law that the Takings Clause does not confer a "right to exclude" but rather the right to be compensated for a taking. And even if the Takings Clause were as broad as respondent alleges, all violations of the Takings Clause present special factors that preclude the judicial creation of a cause of action against individual federal officials under *Bivens*. Thus, the court of appeals' unprecedented acceptance of respondent's *Bivens* claim should also be reversed.

## ARGUMENT

### I. THE COURT OF APPEALS' IMPOSITION OF RICO LIABILITY IS BASED ON AN UNJUSTIFIED EXPANSION OF EXTORTION UNDER THE HOBBS ACT.

The court of appeals' holding that a government official may be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, by performing the predicate act of extortion under color of official right *despite taking no unlawful action*, should be reversed. Until this remarkable decision, a government official acting under color of official right violated the Hobbs Act only when that official attempted to take, or actually took, property from another *without legal authority to do so*. In *Robbins*, however, the court of appeals created another violation of the Hobbs Act—namely, an otherwise lawful taking with "extortionate intent." This newly crafted extension of RICO liability, which could be called "*Robbins* extortion," transforms hard-working regulators into racketeers premised solely on their alleged state of mind. This is contrary to a

reasonable interpretation of the law. See, *e.g.*, *Sinclair* v. *Hawke*, 314 F.3d 934, 943-944 (CA8 2003) ("[B]ank regulators do not become racketeers by acting like aggressive regulators.").

Moreover, the reach of *Robbins* extortion extends well beyond petitioners' civil liability under RICO, and further implicates criminal liability. The petitioners' RICO liability is predicated upon an act that is indictable under the Hobbs Act. 18 U.S.C. §1961(1)(a) and (b). The Hobbs Act, in turn, provides that extortion is punishable by criminal or civil penalties. 18 U.S.C. §1951. Thus, by misconstruing the Hobbs Act to create a novel species of extortion-like activity, the court of appeals' ruling enlarged the scope of actionable conduct under that statute. Because violations of the Hobbs Act provide a basis for criminal sanctions, the court of appeals' ruling effectively creates a new crime. This "judicial legislation under the guise of construction" is outside the boundaries of the court's authority and is erroneous as a matter of law. *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

### A. Government Officials Do Not Violate the Hobbs Act by Using Lawful Regulatory Authority To Take Property That the Government Has a Right To Receive.

The Court need look no further than the text of the Hobbs Act to determine that government officials acting pursuant to their regulatory authority do not, as a matter of law, perform the predicate act of extortion under this statute.

#### 1. Government Official Actions Taken Pursuant to Statutory Powers Cannot Form the Basis of an Extortion Claim.

The Hobbs Act expressly defines "extortion" as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. §1951(b)(2).

Extortion under color of official right, in turn, is defined as "the use by a public official or employee of the power and authority of the office *[he] [she]* occupies in order to obtain money, property, or something of value from another to which that government official or employee or that government office *have no official right*." 2A K. O'Malley, et al., Federal Jury Practice & Instructions §53.09 (5th ed. 2006) (defining extortion under color of official right) (alternation in original) (second emphasis added); see also *e.g.*, *United States* v. *Cerilli*, 603 F.2d 415, 419-420 (CA3 1979) (holding that seeking payments under the guise of political contributions was extortion). "[A] public official [who] has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts*" is an extortionist. *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (emphasis added). *See also United States* v. *Kenny*, 462 F.2d 1205, 1229 (CA3 1972) ("Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office.").

The key to extortion in the context of public officials, then, is the abuse of official power to obtain something to which the public official has no right. For example, a public official extorts when exacting a payment "for the promise to perform (or not perform) an official act." *McCormick* v. *United States*, 500 U.S. 257, 273-274 (1991) (internal quotation marks omitted) (holding that a *quid pro quo* is a necessary element of extortion when a government official receives a campaign contribution). Consistent with this basic concept, no authority supports "the proposition that federal employees who take regulatory action *consistent with their statutory powers* engage in a 'pattern of racketeering activity' [merely because] those actions are adverse to a particular industry or business activity." *Sinclair*, 314 F.3d, at 943-944 (emphasis added). Indeed, as the Third Circuit explained when rejecting such a proposition in *Sinclair*, "the proposition is ludicrous on its face." *Ibid.*

## 2. Government Officials Enforcing Governmental Property Rights Are Not Extortionists.

By the same token, no court (other than the court of appeals in *Robbins*) has ever held that the government extorts property when it acts as a property owner and seeks reciprocal rights-of-way in exchange for a grant of a right-of-way across public lands, as in the present case.[2] To the

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[2] As this Court has recognized, the history of the settlement of "the territory we now regard as the American West" has led to a vast patchwork of intermingled public and private land holdings, much like the lands implicated in this case. *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672 (1979). In many cases, Congress instituted a "'checkerboard' land-grant scheme," whereby land granted to transcontinental railroads was divided into "checkerboard" blocks, with odd-numbered lots granted to the railroad and even-numbered lots retained by the Government. *Id.*, at 672. As the Court noted in *Leo Sheep*, "[a]s a result, [railroad] land in the area of the right-of-way was usually surrounded by public land, and vice versa." *Ibid.* In addition to the "checkerboards" created by railroad land grants, many other public and private lands are substantially intermingled and interdependent for access. In 1992, the General Accounting Office found that some fifty million acres of public lands had inadequate legal public access, largely due to the unwillingness of private landowners to provide such access. *See* U.S. Gen. Accounting Office, Federal Lands: Reasons for and Effects of Inadequate Public Access, GAO/RCED-92-116BR, (April 1992). Congress has also recognized the needs of private landowners to obtain access across federal lands, see, *e.g.*, Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. §3210(a) (instructing Secretary of Agriculture to provide access to nonfederally owned land within the boundaries of the National Forest System), Federal Land Policy and Management Act of 1976, 43 U.S.C. §1761(a) (authorizing Secretary of the Interior to grant, issue, and renew rights-of-way across public land), as well as prohibiting the enclosure (by fencing) of "land-locked" public lands, *see* Unlawful Inclosures Act, 43 U.S.C. §1061, *Camfield* v. *United States*, 167 U.S. 518 (1897). As a result the historical events that led to of this patchwork of public and private lands, the use of reciprocal rights-of-way to ensure both public and private access is a long-recognized process and one expressly authorized by BLM regulations. *See* 43 C.F.R. §2801.1-2 (authorizing BLM officials

contrary, caselaw supports the opposite conclusion. In *Washoe County*, the appellants unsuccessfully sought a right-of-way permit across government land. *Washoe County* v. *United States*, 319 F.3d 1320, 1327-1328 (CA Fed. 2003). The denial of Washoe County's right-of-way application was not a regulatory taking because the government "acting as a landowner" did not "impose[] regulatory restrictions on the use of Appellants' private property." *Ibid.* It is axiomatic that absent a taking of property (or attempted taking) extortion cannot lie.

Similar to *Washoe County*, the petitioners—acting on behalf of the government as landowner—did not take respondent's property. Rather, the petitioners were authorized to obtain reciprocal easements and grant right-of-ways across public land,[3] to access respondent's land,[4] and to file trespass charges against the respondent.[5] Because respondent failed to make the required annual payment for its right-of-way onto government property and refused to grant the government a reciprocal easement, the BLM canceled the respondent's right-of-way across public lands. Pet. 5. Since the

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to require applicants for right-of-way grants "as a condition to receiving a right-of-way grant, to grant the United States an equivalent right-of-way").

[3] 43 C.F.R. §2801.1-2.

[4] 43 C.F.R. §4130.3-2(h) (stating that "permittees or lessees shall provide reasonable administrative access across private and leased lands to the Bureau of Land Management for the orderly management and protection of the public lands").

[5] 43 C.F.R. §2801.3(a) (defining as a trespass any use of public lands requiring a right-of-way without authorization); 43 C.F.R. §2920.1-2(a) (defining as trespass any use of public lands, other than casual use, without authorization under specified procedures); 43 C.F.R. §4140.1(b)(i) (prohibiting anyone from allowing livestock to use BLM lands without permit, lease, or other authorization).

government officials did not take (or attempt to take) respondent's property, extortion cannot be found.

The *Robbins* panel, however, concluded that the petitioners' actions taken on behalf of the government as landowner and pursuant to well-established regulations resulted in extortion and violated clearly established law. But it is preposterous to hold that a governmental official who is merely performing his or her job within statutory and regulatory authority is properly labeled an extortionist.

### B. The Court of Appeals for the Tenth Circuit Interpreted the Hobbs Act Too Broadly By Adding a Category of Liability Based Solely on "Extortionate Intent."

After conceding that regulatory authority may have existed for each of the allegedly extortionate acts on which respondent's RICO claims are based, the court of appeals nonetheless held that the petitioners could still perform the predicate act of extortion under color of official right. Pet. App. 17a-18a. To do so, the court rewrote the Hobbs Act to cover taking property under lawful authority if done with a particular motive. Thus, according to the court of appeals, *Robbins* extortion arises when a government official takes an otherwise lawful action with an "intent to extort." The court reasoned that performing lawful acts with an "intent to extort" meets the predicate act of extortion under color of official right: "[W]e conclude that if Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." Pet. App. 18a.

In essence, the court of appeals held that performing lawful actions for the purpose of extorting property is extortion. But if those same lawful acts are performed merely for

the purpose of taking property pursuant to government regulations, then no extortion is possible.

And in so doing, the court of appeals confused the legal concepts of "motive" and "intent." "[M]otive" is "the inducement to do some act," whereas "intent" is the "mental resolution or determination to do [some act]." Black's Law Dictionary 813 (7th ed. 1999). Thus, motive is the purpose or reason for taking an action, but intent is the mental state associated with actually taking an action. Whether a government official taking lawful actions is "carrying out regulations intending to extort property" or "carrying out regulations intending to take property," that governmental official's intent is the same. The official's *intent* is the intent to perform the particular actions; the only difference is the official's *motive* for doing so. Thus, when the court of appeals referred to "extortionate *intent*," it actually meant "extortionate *motive*."

Before *Robbins*, courts recognized that "[e]vidence of motive is not relevant to any element of Hobbs Act extortion." *United States* v. *Agnes*, 581 F.Supp. 462, 477 (EDPA 1984). Extortion could not lie where a government official acquired property by taking authorized actions pursuant to his or her statutory or regulatory authority. But after *Robbins*, a finding of extortion under the Hobbs Act can be based solely upon lawful actions taken by the official, depending only on the official's motive. By so holding, the court of appeals turned what had been an irrelevant factor to Hobbs Act extortion—motive—into a case-dispositive one, capable of turning lawful acts of a government official into crimes. Although the court of appeals framed its analysis in terms of intent, the court held that lawful actions performed with a motive to extort automatically transmutes those otherwise lawful actions into unlawful extortion. Pet. App.

18a. But just as thoughts alone cannot be crimes[6] and lawful actions alone cannot be crimes, the combination of allegedly improper thoughts with lawful actions cannot be a crime.

Properly construed, the Hobbs Act is violated upon the *unlawful* taking of property under color of official right. 18 U.S.C. §1951. The Hobbs Act covers "those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States* v. *Enmons*, 410 U.S. 396, 400 (1973). For example, extortion occurs when the wrongdoer takes property that he or she has no right to claim. *Cerilli*, 603 F.2d, at 419-420. Extortion may also occur if a person uses physical violence to take property, even if he has a rightful claim to that property. *United States* v. *Warledo*, 557 F.2d 721, 730 (CA10 1977) (finding extortion based on using violence to receive property). This is because the wrongful act of violence transforms the otherwise lawful act of taking into an unlawful act of extortion.

The *Cerilli* and *Warledo* line of cases support this reading of the Hobbs Act. These cases stand for the proposition that extortion requires either (1) taking of property absent a lawful claim to that property or (2) an otherwise lawful taking of property accompanied by an act that causes violence or fear.

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[6] United States law has long eschewed criminalizing a mere state of mind. See Model Penal Code §2.01, cmt. 1 (1985) ("It is fundamental that a civilized society does not punish for thoughts alone."); Brenner, Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?, 13 Alb. L.J. Sci. & Tech. 273, 364 (2003) ("Criminal liability is imposed for what one does or endeavors to do, not for what one thinks or would think, if certain notional ideas were available as part of the public discourse. This is because substantive criminal law incorporates the concept of free will. Notional ideas and thoughts about notional ideas cannot themselves inflict any of the socially intolerable types of harm that societies must proscribe to survive, but actions can. Therefore, criminal liability is imposed only when thoughts are translated into proscribed actions.") (footnotes omitted).

In either case extortion cannot be found unless the defendant performed an unlawful act. "[T]o hold that [government regulators] commit the federal crime of extortion when they act [pursuant to government regulations] . . . is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'" *McCormick*, 500 U.S., at 272.

Notably, motive is absent from the text of the Hobbs Act. And basic principles of statutory construction prohibit rewriting the statute to add motive as an element of the Hobbs Act. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). The court of appeals' ruling was improper because it resulted "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) (internal quotation marks omitted, other alterations in original).

Despite performing only lawful actions, the petitioners nevertheless face treble RICO damages upon a bare allegation of a motive to extort. "By these claims, Mr. [Robbins] seeks to have a jury decide whether [petitioners'] facially lawful regulatory actions were the product of unlawful motive. . . . [S]uch judicial review of the actions of [the petitioners] . . . would be unprecedented." *Sinclair*, 314 F.3d, at 939. Governmental officials who diligently perform their jobs have never been, until *Robbins*, extortionists.

### C. Qualified Immunity Should Not Have Been Denied Because *Robbins* Extortion Was Not "Clearly Established" Law When Petitioners Performed the Alleged Extortionate Acts.

Even assuming that the court of appeals correctly determined that an otherwise lawful taking of property by a government official with an extortionate motive violates the Hobbs Act, the court of appeals erred in denying qualified immunity. Even when a plaintiff has properly alleged a violation of a constitutional right, a government official is entitled to qualified immunity unless the plaintiff can also show that the "law *clearly established* that the [official's] conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). To be clearly established sufficient to justify a denial of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

What was clearly established prior to *Robbins* was that obtaining property only through an illegal action—an action involving violence, threats, fear, or receiving property not under an official right—is extortion. That is, until *Robbins*, no court recognized that extortion also applies to attempted takings of property by a government official whose actions were specifically authorized by statutes and regulations. Pet. App. 21a (acknowledging that "no court [] rejected the claim of right defense under circumstances identical to the ones presented by this case."). Therefore, before *Robbins*, no reasonable governmental official informed of Hobbs Act case law would have ever imagined lawful actions taken pursuant to duly promulgated regulations could fall within the scope of the prohibition of the criminal Hobbs Act. To do so would sweep both lawful and unlawful actions—essentially every action a government official takes—within the ambit of the

Hobbs Act. Indeed, pre-existing case law characterized such a result as "ludicrous on its face." *Sinclair*, 314 F.3d, at 934.

In light of the pre-existing contours of Hobbs case law, qualified immunity should be afforded to petitioners. Simply put, there was no way reasonable government officials could have anticipated that their actions that were lawful pre-*Robbins* might suddenly become unlawful post-*Robbins*. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as" the government official acts within his or her statutory authority. *McCormick*, 500 U.S., at 272. Consequently, the petitioners' conduct could not have violated clearly established law, and, at a minimum, the denial of qualified immunity should be reversed.

### D. Expanding Hobbs Extortion To Include Lawful Actions Will Adversely Impact Government Regulators.

Finally, expanding Hobbs extortion to include actions taken pursuant to lawful government authority will send shock waves through governmental agencies who routinely interact with the public. This remarkable and erroneous decision, if not overturned, will impact a wide array of government officials by severely hampering their ability to perform their jobs.

#### 1. Upholding *Robbins* Extortion Will Have a Chilling Effect on Regulatory Government Officials.

A governmental official exercises discretion in many, if not most, official decisions. The exercise of discretion, especially when a government official is negotiating property rights, creates a tense relationship between a property owner and a government official. This relationship is emotional

and strained at best. Moreover, "judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982). In light of this contentious environment, discovery into the motive of a decisionmaker may be boundless. "Inquiries of this kind can be peculiarly disruptive of effective government." *Id.*, at 817.

The court of appeals' holding will expose government regulators to potential personal liability under RICO anytime that regulators' disputes with citizens involve property. These acrimonious property disputes are fertile grounds for alleging that the government official made a discretionary decision with a bad motive. And under *Robbins*, a mere allegation of "extortionate intent" will be sufficient to haul a government official into court to face racketeering charges. Given this reality, the *Robbins* decision could perversely condone a form of extortion claims to coerce governmental officials to take or refrain from engaging in lawful regulatory activities. And, in turn, the looming threat of personal liability will surely "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow*, 457 U.S., at 814 (internal quotation marks omitted, other alterations in original). If left unchecked, the court of appeals' decision will chill federal employees' diligent performance of their regulatory duties. To prevent such a preposterous result, governmental employees must have discretion to perform their lawful job functions without the threat of ruinous personal litigation.

Under the court of appeals' view, extortion may hinge on the thoughts, rather than the actions of a government official. Performing actions according to law will not protect a regulator from a RICO charge. Identical conduct may lead to different outcomes depending on the state of mind of the defendant. This uncertainty in identifying extortionate conduct will further impede a regulator from performing his

or her lawful duties. Furthermore, a state of mind analysis is a subjective inquiry. And in *Harlow*, the Court previously rejected a subjective-based analysis of official behavior: "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S., at 818 (footnote omitted). The Court should bury the nebulous subjective intent test in favor of an objective test that focuses on a government official's actions rather than thoughts.

### 2. A *Robbins* Extortion Allegation Vitiates the Qualified Immunity Privilege of Government Officials.

A government official's qualified immunity defense seeks to strike a balance between a citizen's constitutional rights and a government official's ability to adequately perform his or her job. *Anderson*, 483 U.S. 635, at 639. Qualified immunity responds to the "concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen* v. *City of Independence*, 445 U.S. 622, 655-656 (1980). Indeed, qualified immunity "should avoid the excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. 800, at 818.

The court of appeals equated a lawful attempt to obtain property while having an allegedly "extortionate intent" with unlawful taking of property under color of official right. Pet. App. 22a. By so doing, the court employed a test of clearly established law that bore "no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."

*Anderson*, 483 U.S., at 639. Under *Robbins*, a plaintiff's RICO claim is sufficient if the plaintiff alleges that the official performed lawful duties with an extortionate motive. Because proof of motive is a fact-intensive subjective inquiry, creative plaintiffs could easily allege an extortionate motive sufficient to withstand summary judgment. And without the ability to dispose of such a case before trial, the government official facing a *Robbins* extortion charge thus has essentially lost his or her qualified immunity. See *Saucier*, 533 U.S., at 200-201 ("The [qualified immunity] privilege is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.") (internal quotation marks omitted, emphasis in original). The court of appeals transformed qualified immunity into "unqualified liability simply by [a plaintiff] alleging" an extortionate intent. *Anderson*, 483 U.S., at 639.

### 3. *Robbins* Extortion Will Touch Many, If Not Most, Government Officials Who Negotiate Property Rights With Others.

These *Robbins* extortion actions will arise in many contexts. Cases involving an actual or attempted regulatory or physical taking of real property are prime candidates for contentious dealings leading to allegations of extortionate intent. But the potential swath of *Robbins* sweeps much wider. For example, since IRS investigations typically involve monetary and other property disputes, a *Robbins* extortion action could be filed on behalf of a taxpayer against an IRS agent. But cf., *Fishburn* v. *Brown*, 125 F.3d 979, 983 (CA6 1997) (declining to extend a *Bivens* action to an IRS agent's actions taken in a taxpayer dispute).

And the possibilities do not stop there. Whenever a property right is at stake, RICO liability will become an issue. RICO liability may also be found in cases involving intellectual property infringement claims asserted against the

government, social security cases, government seizure of property, welfare benefits cases, and denial of insurance claims, such as Medicare and Medicaid. Each and every property dispute potentially could spawn a *Robbins* action.

## II. THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT'S TAKINGS CLAUSE-BASED RETALIATION CLAIM WAS ACTIONABLE UNDER *BIVENS*.

Although the court of appeals' RICO holding was grievously erroneous, its holding on respondent's *Bivens* claim was perhaps no less so. It is important to start by clarifying the true scope of respondent's claim. Even though the court of appeals' *Bivens* holding speaks of respondent's alleged "Fifth Amendment" rights, the only portion of that amendment that relates to his claim is the Takings Clause. Thus, his claim is best described as being based on the Takings Clause, and not the broader Fifth Amendment.[7]

In an unprecedented decision, the court of appeals accepted respondent's claim. The court held that (1) the Takings Clause conferred upon respondent the "right to exclude" the government from his property, as well as to be free from retaliation for the exercise of his Takings Clause-based "right to exclude"; and (2) that these newly crafted rights were "clearly established law."

This was reversible error. As this Court has explained, it is a "basic axiom" that the Takings Clause does not confer a "right to exclude" but, rather, the right to be *compensated* for *a taking*. And whatever the breadth of right conferred by the Takings Clause, violations of the Takings Clause necessarily present special factors precluding judicial creation of a *Bivens* claim against individual federal officials. Thus, the court of

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[7] Reference to the Takings Clause rather than the Fifth Amendment will also avoid confusion with the Court's precedent on the availability of a *Bivens* claim under the Fifth Amendment's Due Process Clause. See *Davis* v. *Passman*, 442 U.S. 228, 243-244 (1979).

appeals' extraordinary holding on respondent's *Bivens* claim should also be reversed.

### A. The Takings Clause Does Not Confer the "Right to Exclude" but, Rather, the Right to Be Compensated for a Taking—And Respondent Has Not Alleged a Violation of That Right.

Contrary to the court of appeals' holding, the Takings Clause provides no right to exclude the government from private property. The court of appeals correctly concluded that there is a "right to exclude" others—whether private citizens or government officials—from one's property. Pet. App. 12a-13a. Where it erred, though, was in holding that this right was provided by the Fifth Amendment. *Id.*, at 13a-15a. It is a "basic axiom that [p]roperty interests . . . are not created by the Constitution." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotation marks omitted, other alterations in original). "Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Ibid* (internal quotations marks omitted).

The Takings Clause neither provides individuals with the right to exclude the government from their property, nor confers what would be the more narrow (and far more constitutionally tethered) right to prevent the government from lawfully taking their property for public use. Instead, the right provided by the Takings Clause is the right to *seek compensation* when the government takes property for public use:

> "[A]s the Court has frequently noted, [the Takings Clause] *does not prohibit the taking of private property*, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se,

> *but rather to secure compensation in the event of otherwise proper interference amounting to a taking.*" *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314-315 (1987) (citations omitted, emphasis added).

Because no taking occurred here, petitioners did not violate the right protected by the Takings Clause. And given that respondent had no right under the Takings Clause to exclude the government from his property, he certainly had no right under the Takings Clause to be protected from government "retaliation" for his attempts to exclude the government from his property.

Moreover, even if the Takings Clause did confer an anti-retaliation right, that right would not extend to respondent. As explained above, landowners do not have a right under the Takings Clause to prevent the government from taking their land for public use, but only to seek compensation for such a taking. As such, if the Takings Clause did protect against retaliation for the exercise of rights protected thereby, such protection might well extend to retaliation directed towards a landowner's attempt to receive just compensation for a taking. But it would not encompass retaliation directed towards a landowner's efforts to *prevent* the taking from occurring altogether.

### B. "Special Factors" Separate from the Administrative Procedure Act Preclude *Bivens* Liability for a Takings Clause Violation.

Regardless of whether the Takings Clause in fact protects against retaliation for the exercise of rights protected thereby, such a result would not support a *Bivens* action. The Takings Clause defines its own remedy—just compensation—and the Tucker Act, 28 U.S.C. §1491, provides a forum for that remedy to be obtained from the United States. Thus, "special

factors" exist that preclude creating *Bivens* liability for *any* Takings Clause violation.

*Bivens* liability for violations of a particular constitutional right will not be created where there are "special factors counseling hesitation in the absence of affirmative action by Congress." See *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). On several occasions, the Court has found the existence of congressionally created remedies for the constitutional violation to be a special factor counseling hesitation and precluding a *Bivens* claim against individual officers. See, *e.g.*, *Bush* v. *Lucas*, 462 U.S. 367, 378-380, 389-390 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412, 420-425 (1988).

The case against *Bivens* liability for a Takings Clause violation is perhaps even stronger than in these previous cases, because here the constitution itself defines a remedy. That is, no matter what the full contours of the Takings Clause's protections may be, the remedy for any violation of the Takings Clause is implicitly defined by the clause itself: "just compensation." U. S. Const., Amdt. 5. And through the Tucker Act, Congress has provided a judicial forum for plaintiffs to obtain that remedy from the United States. See 28 U.S.C. §1491. The fact that the constitution itself defines a remedy for Takings Clause violations indicates that a broader remedy should not be judicially created. Where Congress has specifically provided means to seek this remedy against the United States, but not individual officers, the judiciary should not create alternative means to proceed against officers individually—especially where the same remedy that can already be had from the United States.

Indeed, the availability of a constitutionally defined remedy through a suit against the United States makes fashioning *Bivens* liability against individual officers particularly inappropriate. The Court has acknowledged that a factor—though far from a dispositive one—in determining whether a

*Bivens* claim may be brought is whether remedies under a *Bivens* claim would be more effective than those under pre-existing causes of action. See *Carlson* v. *Green*, 446 U.S. 14, 18-23 (1980) (recognizing and applying this factor); but see *Bush*, 462 U.S., at 368, 372 (denying *Bivens* liability even while acknowledging superiority of *Bivens* remedies). But here, given that the right in question dictates it own remedy—*i.e.*, just compensation—it is no more effective for plaintiffs to seek that remedy from individual officers instead of from the United States. In fact, the United States' financial resources make it the best source of compensation for Takings Clause violations.

For these reasons, it is unnecessary for the Court to consider whether the APA independently precludes *Bivens* liability in this case. Although *amici* are generally inclined to agree with the petitioners' reasoning on the *Bivens* issue, they believe that this issue can be determined without reference to the APA.

And it should not even be necessary to explain how, even if respondent's view of the Takings Clause were correct, it was in no way clearly established law. To accept that such novel principles were "clearly established law" would be to nullify the doctrine of qualified immunity altogether.

## CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 06-219

# In The Supreme Court of the United States

CHARLES WILKIE, ET AL.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE NEW MEXICO CATTLE GROWERS' ASSOCIATION, NEW MEXICO FEDERAL LANDS COUNCIL, NEW MEXICO WOOL GROWERS, INC., GRANT COUNTY AREA CATTLEGROWER'S ASSOCIATION, COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH AND WYOMING PUBLIC LANDS COALITION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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## INTERESTS OF *AMICI*[1]

Six organizations join in this *Amici Curiae* Brief. The New Mexico Cattle Growers' Association is a non-profit organization with some 1600 members of New Mexico's livestock industry. Its purpose is to promote and protect the interests of its livestock producing members. Many, if not most, of the Association's livestock producer members hold permits or leases to utilize federal lands, including those administered by the Bureau of Land Management ("BLM"), and other public lands for livestock grazing. A large number, if not the majority, of New Mexico ranches include federal or public lands of some sort and grazing of federal or public lands is essential to their operations.

The New Mexico Federal Lands Council is a non-profit organization with approximately 3,500 members who are engaged in the livestock industry. Most of its members graze livestock on federal lands and deal with federal land management agencies on a routine basis. The New Mexico Wool Growers, Inc., is a non-profit corporation which works for the mutual protection and benefit of its members engaged in the wool growing and sheep and goat raising industry. The Grant County (New Mexico) Area Cattlegrower's Association is a non-profit corporation formed to protect and improve the cattle industry. The Coalition of Arizona/New Mexico Counties for Stable

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[1] Pursuant to Supreme Court Rule 37.6, *amici* confirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a).

Economic Growth is a non-profit corporation made up of county governments, businesses, organizations and individuals in Eastern Arizona and Western New Mexico. Its mission is to maintain and increase the economic base which results from federal lands, which are prevalent in each of its member counties, and to protect private property rights of persons and industries dependent on federal lands.

The Wyoming Public Lands Coalition is a coalition of livestock associations and producers in Wyoming. The Coalition works to promote and protect livestock producers and provide range science-based technical assistance to members.

## SUMMARY OF ARGUMENT

BLM officials have broad authority to manage public lands in the West and to regulate private uses of those lands. However, their powers are strictly constrained by the laws enacted by Congress to govern grazing and other uses. These regulators must act within the statutory limits, as well as the regulations and policies they themselves promulgate. Ranching in the arid West, and particularly public lands ranching, is substantially different than the raising of livestock in other areas of this nation, and involves unique management among the mix of federal, state, private and other lands that make up a ranch unit. Western ranching is the oldest and most traditional form of livestock production in the nation, and is entering its fifth century.

*Amici Curiae* urge affirmance of the decision of the Tenth Circuit Court of Appeals.

## ARGUMENT

### I. BRIEF SUMMARIES OF THE BACKGROUND AND SETTING OF THIS CASE WILL BE HELPFUL TO THE SUPREME COURT IN ANALYZING THE ISSUES PRESENTED

#### A. A Short History of Livestock Grazing in the American West

What is now the American West was originally occupied by numerous groups of Indian peoples but they did not domesticate and raise livestock until after the arrival of Europeans. Cattle and sheep were initially brought to what is now New Mexico in 1540 by Francisco Vásquez de Coronado. Richard Flint and Shirley Cushing Flint, *The Coronado Expedition to Tierra Nueva, The 1540-1542 Route Across the Southwest*, 6 (1997). Seven thousand head of livestock were permanently introduced, along with horses, to the Southwest by Don Juan de Oñate who established permanent Spanish settlement in northern New Mexico in 1598, years before the English founded Jamestown and the pilgrims landed at Plymouth Rock. Max L. Moorhead, *New Mexico's Royal Road, Trade and Travel on the Chihuahua Trail*, 8 (1958); Marc Simmons, *The Last Conquistador, Juan de Oñate and the Settling of the Far Southwest*, 112-120 (1991). The Western livestock industry thus began in New Mexico and expanded over the years throughout the West.

Livestock from early New Mexico communities grazed on "commons" attached to the villages. Marc Simmons, *Spanish Pathways, Readings in the History of Hispanic New Mexico*, 119 (2001). Community expansion within this isolated Spanish territory occurred due to ranching. "[S]tock raising, instead of farming, propelled most of the Hispanics who expanded their frontiers," and this

"emergent class of stockmen, whose desire it was to add to their grazing lands, led the way." Richard L. Nostrand, *The Hispano Homeland*, 76 (1992). The actions of pioneering families, like the Martinezes of Taos, on the eve of the American occupation of New Mexico, were typical:

> The brothers also expanded their father's ranching operations in new directions, using open range, to which they may or may not have held title, as was the custom.

David J. Weber, *On the Edge of Empire, The Taos Hacienda of Los Martínez*, 73 (1996). As early as 1800, ranchers in New Mexico exported almost 19,000 sheep and over 200 cows several hundred miles south to Chihuahua over the Camino Real. Moorhead, at 45.

The United States acquired from France all or part of the Western states of Colorado, Wyoming and Montana in the 1803 Louisiana Purchase. Four and a half decades later, Mexico ceded California, Nevada, Utah, Arizona, and New Mexico and parts of Colorado and Wyoming to the United States, and the new government guaranteed protection of existing rights in property that were secured by the prior sovereign. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

After the United States acquired the West, most lands were open to settlement and occupation. George Cameron Coggins and Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 Envtl. L. 1, 3-22 (1982). Rangelands were open to any who wished to use them and the "open range" system was born. *Id.* at 28-31. Use of public lands was encouraged by the federal government in order to encourage expansion and settlement. *Id.* at 3-22. The Homestead

Act of 1862, 43 U.S.C. §§ 161-180 (repealed 1976), was designed to encourage settlement on public lands, but its 160 acres did not work well in the arid West and was completely inadequate for those seeking to make a living by raising livestock. In response to this situation, stockmen would homestead a location that had water and use the surrounding open range for livestock grazing.

> Acquiring a stock range was a simple matter in the early days of the industry before the country became crowded with cattle. It was only necessary to secure title to an available water supply in order to control land for miles around as surely as though that land were actually owned.

Victor Westphall, *The Public Domain in New Mexico, 1854-1891*, 42 (1965).

> Since there was only limited arable land in New Mexico, and that largely occupied [by 1877], the paramount attraction was the pasturelands. The key to their occupancy was water. He who controlled the water controlled all the surrounding lands. Ownership of a few acres with surface water frequently carried with it undisturbed use of thousands of acres of grasslands which were a part of the public domain.

Ira G. Clark, *Water in New Mexico, A History of Its Management and Use*, 48 (1987). This New Mexico experience played itself out in all of the states and territories of the West.

The Mining Act of 1866, 43 U.S.C. § 661, provided that "rights to the use of water" on the public lands which are "recognized and acknowledged by the local customs, laws, and decisions of courts" would be "maintained and protected." This has been interpreted as a federal deferral to

state and local law and custom in matters of water rights. *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604, 614 (1978). Allowing state water law to control afforded the United States the ability to allow possessory interests to be created on federal lands. Congress "encouraged expansion, exploitation and development of the public lands" in the hope that this would lead to settlement resulting in acquisition or sale of the public domain. *See Wilkenson v. Dep't of the Interior*, 634 F.Supp. 1265, 1275 (D. Colo. 1986).

Since Western stockmen could not homestead and thereby acquire title to the thousands of acres necessary for a viable ranch operation, they generally acquired title to just those essential lands with waters (streams, ponds, springs, etc.). *See* Phillip O. Foss, *Politics and Grass, The Administration of Grazing on the Public Domain*, 26-29 (1960). Using those waters, described by the federal surveyor-general for the Territory of New Mexico as "the nucleus of their stock ranges" (Clark, at 49), stockmen established Western ranches. The early settlers, homesteaders and ranchers then acquired title to the better lands, being those with water and most amenable to settlement. Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 Envtl. L. 481, 497 (2006). Over the years, Congress reserved blocks of other public lands for specific purposes, such as Indian homelands, military reservations, and national forests. Yet, millions of acres in the West remained unclaimed for federal reservation for specific purposes or for transfer into private ownership. Coggins, at 20-21. Many of these remaining lands were usable only for range purposes, the grazing of livestock. *Id.* The federal government freely

allowed possessory livestock uses of public lands under the "open range" system throughout the nineteenth century and well into the twentieth. *Id.* at 20-30.

### B. A Summary of the Development of Grazing Administration on Federal Lands in the West

The "open range" system worked well until Western ranges became filled with livestock, cattle and sheep competed for the same range, and population increased. Foss, at 34-35. With no restrictions on any individual grazing operator, the numbers of livestock grew significantly. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 731 (2000) (noting that there were over seven million head of cattle in the Great Plains during the 1880's boom). Livestock overpopulation led to range degradation as well as human conflict. *Id.* at 732. Federal policy nevertheless did not yet change on the public lands.

The depression of the 1930's, combined with drought and "dust bowl" conditions, pushed Congress to act. *Id.* at 733. Cattlemen encouraged and supported basic federal regulation of the rangelands, and the result was the Taylor Grazing Act of 1934 ("TGA"), 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (2006)). The TGA had three purposes:

- regulation of the occupancy and use of the public rangelands,
- protection of the public rangelands from harm, and
- stabilization of the livestock industry.

48 Stat. 1269; *see also Public Lands Council v. Babbitt*, 167 F.3d 1287, 1290 (10th Cir. 1999), *aff'd* 529 U.S. 728,

733 (2000). Another court found that the purpose of the TGA is "to stabilize, preserve, and protect the use of public lands for livestock grazing purposes." *Barton v. United States*, 609 F.2d 977 (10th Cir. 1979). The "Act was intended to address . . . the need to stabilize the livestock industry by preserving ranchers' access to the federal lands in a manner that would guard the land against destruction." *Public Lands Council v. Babbitt*, 167 F.3d at 1290. The Secretary of the Interior ("the Secretary") was to create grazing districts from among the public domain used for grazing and to determine the amount of grazing to be permitted in each district. 43 U.S.C. §§ 315, 315a and 315b; *see also Public Lands Council v. Babbitt*, 529 U.S. at 733. Grazing districts were to "promote the highest use of the public land, pending its final disposal." 43 U.S.C. § 315.

The Secretary established thirty-seven grazing districts encompassing 140 million acres. *Id.* at 734. The TGA expressly withdrew the land reserved in a grazing district from all forms of entry and settlement. 43 U.S.C. § 315. Inclusion of public land into a grazing district therefore reserved that land for grazing and "the primary use of that land should be grazing." *Public Lands Council v. Babbitt*, 167 F.3d at 1308. To individual ranchers within grazing districts, the Secretary would issue permits to graze livestock within those districts. 43 U.S.C. § 315b.

> Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, or leased by them. . . .

*Id.* In order to issue those permits, the Secretary had to determine the grazing capacity of each district and then "adjudicate" the grazing rights among range users. *Public Lands Council v. Babbitt*, 529 U.S. at 733-734. He established rules to do this.

First preference for adjudicated grazing rights went to those ranchers who owned stock and "base property," which was private land or water rights (since water rights were a severed and separate estate from federal land), and who grazed public range during the five years prior to 1934. This first preference recognized the fact that many ranchers would keep livestock on their private land part of the year and graze public land the remainder of the year. *Id.* at 734. Second preference went to owners of "base property" which was nearby to the federal range, but who did not actually graze public lands in the prior five years. *Id.* The third preference went to "stock owners without base property, like the nomadic sheep herder." *Id.*

> [P]reference in obtaining grazing privileges was accorded to owners of land or water who could support their livestock during the seasons when they were off the grazing district, who required the federal lands in conjunction with their own [lands] to form an economic ranching unit, and who had used the range during the priority period.

Foss, at 63.

The preference right does not guarantee a certain level of grazing but it gives the holder the right to use the maximum amount of grazing that the range will support at any given time, up to the preference limit. Foss, at 63-64.

> The grazing preference served as a stabilizing force for the livestock industry and promoted orderly use of the range by guaranteeing permittees the right to graze a predictable number of stock on the public lands and by allowing them to gauge how large or small their livestock operations could be.

*Public Lands Council v. Babbitt*, 167 F.3d 1287, 1310 (10th Cir. 1999) (Tacha, J., dissenting), *aff'd* 529 U.S. 728 (2000).

> Possession of a grazing preference attached to qualified base property guaranteed a rancher in possession of a permit the right to graze forage up to the amount specified by the preference so long as forage was available . . . and provided them with the certainty that if forage were abundant, grazing up to their preference limit would be authorized.

*Id.* at 1311. Once established, the grazing preference "is to be regarded as an indefinitely continuing right." *Shufflebarger v. Commissioner*, 24 T.C. 980, 992 (1955) (regarding Forest Service preference right).

Once the adjudications were completed, the Secretary was obliged to "safeguard[ ]" the "grazing privileges recognized and acknowledged . . . [s]o far as consistent with the purposes and provisions of this Act." 43 U.S.C. § 315b. The Secretary has the "affirmative obligation to adequately safeguard" grazing privileges of a preference holder. *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949). The Tenth Circuit in *Oman* held that the owner of a grazing preference could sue Interior employees under the Federal Tort Claims Act for "wrongfully aid[ing], allow[ing], and encourag[ing] other livestock operators to utilize the public domain" to which the plaintiffs had preference

rights. *Id.* at 739. While the Secretary has specific authority under the TGA to modify grazing preference, "[a]s long as the permits were unrevoked, [he] would have no more right to interfere with their exercise than would any third party." *Id.* at 742.

In *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938), the District of Columbia Circuit allowed an injunction action to proceed against the Secretary in order to preclude an exchange of public lands that would cut off Red Canyon Sheep Company's grazing preference under the TGA.

> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress.

*Id.* at 315. Recently, the Supreme Court confirmed the Secretary's responsibilities to "adequately safeguard" the grazing privileges of ranchers under the TGA:

> Given the broad discretionary powers that the Taylor Grazing Act grants the Secretary, we must read that Act as here granting the Secretary at least ordinary administrative leeway to assess 'safeguard[ing]' in terms of the Act's other purposes and provisions.

*Public Lands Council v. Babbitt*, 529 U.S. at 742.

While the TGA provided management for grazing federal lands "pending [their] final disposal," 43 U.S.C. § 315, Congress in 1976 decided that those same lands

would remain under federal ownership and management in perpetuity. 43 U.S.C. § 1701(a)(1). In enacting the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784, Congress required the Department of the Interior to take many new steps in the care and management of federal lands, now that they were not to be disposed of, *e.g.*, inventories and classifications, 43 U.S.C. § 1711, land use planning, 43 U.S.C. § 1712, and wilderness assessment, 43 U.S.C. § 1782. However, Congress left the TGA largely intact and reaffirmed the adjudications of grazing rights on lands administered by BLM, requiring (in most cases) grazing permits to be issued for ten years, 43 U.S.C. § 1752(a), giving existing permit holders first priority for renewal of their grazing permits, 43 U.S.C. § 1752(c), and requiring two years advance notice before cancellation of a grazing permit where lands are withdrawn from grazing use, 43 U.S.C. § 1752(g).

Therefore, the TGA remains in effect after the enactment of FLPMA thirty years ago. Certain procedures have been mandated by FLPMA but the rights and privileges granted and guaranteed by the TGA are still viable. FLPMA added a multiple use paradigm on top of the primary purpose of grazing for lands within TGA grazing districts. *See* 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him" under 43 U.S.C. § 1712).

Congress also enacted the Public Rangelands Improvement Act ("PRIA"), 43 U.S.C. §§ 1901-1908, in 1978 in order to "manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values." 43 U.S.C. § 1901(b)(2). PRIA also reaffirmed that public rangelands

shall continue to be managed under the TGA, as well as FLPMA. 43 U.S.C. § 1903(b).

### C. The Basics of Public Lands Ranching in the West

"Public lands ranchers" in the West are those who use a mix of lands in their livestock operations, which includes land owned by the federal and/or state governments. Frequently, a Western ranch will include a combination of privately-owned (deeded) lands, BLM-administered federal lands, and state lands.[2] Many public lands ranches will also have a Forest Service permit for seasonal grazing of livestock on forest lands. Other public lands ranches may include permits or leases for reclamation lands, military lands, lands of other federal enclaves, or even tribal lands. All of these lands are managed by the rancher as a ranch unit.

The private, deeded land in a ranch unit is typically the better land, containing perennial water sources (access to streams or ponds, springs or groundwater wells), or including good grazing land or having natural advantages of terrain, access to highways, and the like. The private land many times originated as a homestead entry or was obtained through another of the Congressional

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[2] State lands are those granted by the United States to newly-admitted states in order to provide income for state government operations. *See, e.g.*, for New Mexico, grant of lands under the Ferguson Act, 36 Stat. 484 (1898) and the New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910). Due to abuses in the use and sale of lands in earlier state grants, Congress placed express trust restrictions on the grants to a number of the Western states. *See, e.g.*, *Lassen v. Arizona*, 385 U.S. 458, 459-464 (1967).

acts allowing settlement of the West. *See* Coggins, at 4-22, for a good discussion of the various means attempted by Congress to induce settlers. The ranch house and other essential ranch buildings are usually on the private land as well.

Water sources (springs, wells, and earthen tanks) are scattered strategically throughout the ranch unit, designed primarily to provide water to livestock as they graze in the various pastures on the ranch. The days of simply turning cattle out on the range are fading. Many, if not most, ranchers now employ various methods of rotation of pastures in order to control utilization of livestock forage to facilitate its growth and viability. A good rancher knows all of his or her grasses, forbs and other palatable forage, knows when and how they grow, and manages livestock to maximize the forage value to them, while maintaining good plant vigor and reproduction.

Common improvements on leased lands (federal, state and other) within a ranch unit include roads, fences, water tanks, windmills and pens for holding cattle. These improvements must be spread throughout the ranch in order to adequately feed, water, move and control the livestock. Federal and state laws require approval of the placement of permanent improvements on their lands. *See*, *e.g.*, 43 U.S.C. §§ 1752(g), 1702(k). Few Western ranches have free-flowing, perennial waters, so most ranchers must construct (and constantly maintain) earthen tanks, to catch surface flowing waters, and windmills or other wells, to pull deep groundwater to tanks on the surface. Cattle require substantial amounts of water every day.

A fully-deeded Western ranch is a rarity and mixed ownership is the norm. Frequently, ranches have only a small amount of private land. Under the TGA, private

land or water adjacent to federal lands is required in order to qualify for the lease or permit. *See* 43 U.S.C. § 315b. Respondent Robbins' ranches are somewhat rare, in that they have a high percentage and amount of private land, over 80,000 acres and about half of all of the lands within the entire ranch units. *See* JA 136 (map of Robbins' ranches). The BLM public lands are shown in yellow, with BLM grazing allotment boundaries delineated with green lines. Robbins' private lands are shown in orange, state (Wyoming) lands are in blue, and private lands other than Robbins' in white. As with many Western ranches, Robbins holds a U.S. Forest Service permit to take cattle into the forested high country rangelands in warmer months. The forest lands are to the west of Robbins' ranches and are clearly seen in solid green on the left side of JA 136. This is a common practice in Western public lands, where the private lands and BLM federal lands tend to be in the lower country and Forest Service lands in the higher, more mountainous country. This mix of lands allows a public lands rancher to move livestock frequently around the various pastures and ranges within the ranch unit, using grasses and other forage where it is seasonally available and avoiding overuse in any particular area. Under this type of management, cattle spend the warmer months in the cooler, wetter high country and the cold months in the low country where they are more easily kept together, fed and protected from cold, harsh weather. Robbins' cattle winter on the lowlands in the East and West Cottonwood pastures (in the left central area of JA 136) and the cattle are moved to summer pasture at Rock Creek and on Forest Service land (at the far left center of JA 136). The map clearly shows the mix of land ownership within Robbins' ranches. Private land in these ranches concentrates along rivers and creeks, and is clearly displayed on

JA 136 within the Wagonhound allotment in the center of the map with the Lower Lodge in the middle along the Cottonwood Creek.

The general mix of land ownership in a typical Western ranch is not as the Petitioners represent it. They imply that *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), is representative of the "complex checkerboard of intermingled parcels of federal, state, and private lands." Petitioners' Brief at 2. They cite *Leo Sheep* several more times in their Brief and cite no other case as an example of mixed land ownership within Western ranches. The situation before this Court in *Leo Sheep* was, in fact, atypical of the Western public lands ranch. The "checkerboard" pattern of federal/private land ownership is almost unique to the railroad grants, because of the unusual land transfer method chosen by Congress for those grants.[3] This pattern is not typical in the West because the "checkerboards" are found only where railroad grants were made, whereas typical public lands ranches contain a much more random mix. Respondent Robbins' ranch is nowhere near the "checkerboard" railroad grants, nor does the map of his ranch look like a checkerboard. *See* JA 136.

The relevance of the government's reliance on *Leo Sheep* is in the inevitable consequences of the railroad grants. "Because of the checkerboard configuration, it is physically impossible [to access federal land] without some minimum physical intrusion upon private land." 440 U.S. at 678. Even in the face of this fact, this Court in *Leo*

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[3] As noted in *Leo Sheep*, the federal grant was of every odd-numbered section within twenty miles on both sides of the railroad track laid through Wyoming and other states. The United States retained the even-numbered sections.

*Sheep* refused to imply an easement which Congress did not expressly provide in the granting statute. In the instant case, it is not impossible for federal lands to be accessed due to the pattern of land ownership. The map, JA 136, shows the federal lands to be accessible in a number of ways. The random ownership pattern of the typical Western public lands ranch makes each ranch's issues regarding road and access patterns unique.

Public lands ranching has allowed good uses of federal lands that otherwise would have never occurred, making those lands productive for food for the nation. *See Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) (TGA "is designed to provide for the most beneficial use possible of the public range in the interest . . . of the public at large. The livestock industry of the West is an important source of food supply for the people of the nation"). Since the BLM-administered federal lands are the lands that went unreserved for special federal purposes and unclaimed for private ownership, they tend to be the more remote and least productive of the federal, and perhaps all Western, lands. *See* Coggins, at 20-22. Many federal lands are too far from any productive uses other than ranching. The TGA and FLPMA have afforded these lands a useful purpose to the nation through inclusion in public lands ranches. *United States v. Fuller*, 409 U.S. 488, 495 (1973) ("[G]razing permits are of considerable value to ranchers and serve a corresponding public interest in assuring the 'most beneficial use' of range lands") (5-4 decision) (Powell, J., dissenting).

The sale of a public lands ranch frequently involves deeding of the private land, transferring the BLM allotment permit, conveying the state lease, transferring the forest permit, conveying easements and rights-of-way,

deeding or conveying water rights, and granting a bill of sale for the livestock and the non-permanent improvements, vehicles and equipment. It is rarely a simple transaction and takes some time to complete. Respondent Robbins went through this type of process when he acquired his ranches in the 1990's, and he also had to transfer special recreation use permits from BLM.[4]

Public lands ranches provide employment and economic opportunity throughout the West and particularly in rural areas dominated by federal lands. J.M. Fowler, D. Rush, J.M. Hawkes, and T.D. Darden, *Economic Characteristics of the Western Livestock Industry* (1994). They "contribute significantly to the local economics" of Western counties, like those which are members of *Amicus Curiae* Coalition of Arizona/New Mexico Counties for Stable Economic Growth. *Id.* at 44. In many Western states, the economic effects of public lands ranches are pervasive because those ranches are generally spread throughout the states' areas. A 1994 study estimated that the direct expenditures in local economies by ranchers using federal lands for grazing were over $800 million, without accounting for any multiplier effects. *Id.* at 2.

[4] Some Western ranches have side businesses offering hunting and fishing and other recreation, but most do not. There are only so many customers for real-life ranching recreation.

## II. WHILE THE BLM AND ITS AGENTS HAVE BROAD AUTHORITY TO MANAGE THE PUBLIC LANDS, THEIR AUTHORITY AND DISCRETION ARE STILL LIMITED

Congress has plenary authority over federal lands under the Constitution's Property Clause. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Congress has delegated much of that authority, in broad terms, to BLM for many of the federal lands. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). All administration of federal lands by BLM is tempered by the laws Congress enacted to direct, authorize and guide this agency. *See Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (regarding constraints upon grazing regulation imposed by TGA and FLPMA, and their regulations); *Hatahley v. United States*, 351 U.S. 173 (1956) (regarding requirements of federal agents to comply with the law and to follow their agency's regulations).

The Taylor Grazing Act creates a balance between federal landlord authority and private rights and/or privileges. Congress gave BLM the basic rules by which to determine preference, and thereby did not grant complete authority or discretion in BLM to make these decisions. 43 U.S.C. § 315b. Those who qualify for preference have the right to enforce it. *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960). Once established, preference rights must be protected by BLM ("adequately safeguarded," per 43 U.S.C. § 315b) and can even be enforced against BLM itself. *See Oman v. United States*, 179 F.2d 738 (10th Cir. 1949); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938). The Tenth Circuit in *Oman* effectively summarized one aspect of the limited grant of authority to federal agents:

> No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States.

*Id.* 179 F.2d at 740. That Court also relied heavily upon the procedural protections built into the TGA to protect grazing preference holders had the government officials indeed taken proper action ("[h]ad such steps [the discretionary authority to revoke or cancel plaintiffs' exclusive grazing privileges] been taken, the plaintiffs would have been afforded procedural safeguards which apparently were not available to them here"). *Id.* The District of Columbia Circuit recognizes that the grazing allowed under a permit resulting from TGA preference rights "make[s] that privilege a proper subject of equitable protection against an illegal act" by a government official. *Red Canyon Sheep Co.*, 98 F.2d at 316.

Even BLM in the instant case recognizes the strict limitations on its authority and does not claim that BLM (as opposed to Congress) has plenary authority over the federal lands it manages. *See* Brief for the Petitioners at 3. In fact, the Petitioners hinge most, if not all, of their claims upon their ability to receive a "reciprocal" right-of-way from a private landowner/grazing preference holder like Respondent Robbins.[5] Brief for the Petitioners at 3-4, 14-15, 17, 25-26, 28-30, 32, 40-41, 47-48 and 52-57.

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[5] As detailed in Respondent's Brief, this case does not involve the granting of mutually "reciprocal" rights-of-way because Robbins would not receive a right-of-way from BLM that is equivalent to the one BLM demands from him. *See* 43 C.F.R. § 2801.1-2; *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991) (BLM cannot require from a rancher a general public easement across private property where BLM's "reciprocal" easement was not equivalent in nature).

Instead, the Petitioner BLM officials attempted to force Robbins to convey private property, an easement or right-of-way, to BLM as a condition unrelated to the proper exercise of their authority under the TGA, FLPMA or any other law. There is no such authority in any statute to require a preference holder/permittee to provide the government a free easement or right-of-way. Similarly, BLM and its employees lack any inherent authority to require this type of conveyance. *See Flint Ridge Devel. Co. v. Scenic Rivers Assoc. of Oklahoma*, 426 U.S. 776, 787 (1976).

A federal "agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. Federal Commun. Comm'n*, 476 U.S. 355, 374 (1986). The executive branch of government has no authority to administer a law "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). This Court in *ETSI* prohibited the Secretary of the Interior from approving a contract under the Flood Control Act of 1944 because the Act gave him no powers to do so. As a corollary to this rule, "[a]n agency cannot confer power upon itself" that is lacking in the pertinent Congressional enactment since this would allow the agency to "override Congress." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374-375.

While the Secretary of the Interior has broad discretion in FLPMA in managing and protecting BLM lands and resources, that discretion is "not unlimited." *Sierra Club v. Andrus*, 487 F.Supp. 443, 448 (D.D.C. 1980), *aff'd Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). "43

U.S.C. §§ 1701 and 1782(c) . . . do not confer absolute discretion upon the Secretary" and "these provisions indicate a congressional intent to set some limit on the Secretary's discretion." *Id.* at 449. The Court in *Sierra Club* held that these two FLPMA provisions:

> . . . would be meaningless if they did not limit the Secretary's discretion in following the general operational directive to manage, protect, and administer the relevant resources in accordance with enunciated statutory standards.

*Id.* While the TGA is silent on the issue, FLPMA grants BLM the power of eminent domain in extremely limited situations. *See* 43 U.S.C. § 1715(a). This provision authorizes purchase, exchange and donation as acquisition methods before the statute lists eminent domain. Then, the Secretary may use eminent domain "only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose." *Id.* Thus, BLM's power to exercise eminent domain is exceedingly confined. What this means in the instant case is that BLM's options to acquire access were by consent or cooperation. BLM and the Petitioners did not seek to acquire rights-of-way from Respondent Robbins by any of the methods allowed by FLPMA. Instead, they attempted to coerce a right-of-way from Robbins through what the Petitioners recognize could be interpreted as "aggressive" or "overzealous regulation" (Petitioners' Brief at 18, 20). Neither FLPMA, TGA nor any other law grants these federal employees the express or inherent power to coerce a private property owner into signing over an easement or right-of-way to the government.

Respondent Robbins recites other actions taken against him in the pattern of harassment and coercion conducted by BLM employees. They revoked his grazing permits and grazing preference, revoked a right-of-way to cross BLM lands, revoked his special recreation use permit, filed false criminal charges against him, trespassed on his private property, filed frivolous livestock trespass charges against him, harassed his ranch visitors and guests, and failed to comply with agreements entered into with Robbins. While BLM employees may have the "lawful regulatory authority" (*id.* at 14) to engage in these general types of activities, they can only do so for legitimate purposes. *See Hatahley v. United States*, 351 U.S. 173, 181 (1956). Under the TGA and FLPMA, legitimate purposes would include actions designed to protect range resources and regulate their uses. Petitioners did not have the proper motives in mind when they undertook improper actions to coerce Robbins into granting an easement to BLM. Federal employees cannot rely upon the result justifying the means. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000) ("[p]ermissible ends ... do not justify unauthorized means," in the Tenth Circuit holding that Secretary lacks authority to issue grazing permits solely for conservation purposes). All citizens have the right to expect a high standard of conduct from their public officials. "[L]aw enforcement officers are held to a higher standard of conduct than are other federal employees." *Watson v. Dep't of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995).

Petitioner BLM employees also charged Robbins administratively with livestock trespass on multiple occasions, including for grazing livestock on his own land.

Under FLPMA regulations, to impose monetary penalties for livestock trespass the acts must be proven to be "willful." 43 C.F.R. § 4150.3. Other penalties for willful trespass are more serious, including the elimination of all grazing privileges. 43 C.F.R. § 4170.1-1. A "willful" trespass requires a showing that Robbins intentionally or recklessly grazed his livestock on public land without authorization from BLM. *John L. Falen*, 143 I.B.L.A. 1, 5 (1998). Robbins, unrepresented by counsel, was induced by the Petitioners to "settle" willful trespass charges based on false statements and threats. As a result, Robbins has lost his grazing preference and privileges on BLM lands.

Petitioners have "lawful regulatory authority" (Petitioners' Brief at 14) to take trespass actions against offending ranchers under FLPMA and its regulations. However, the facts upon which they based trespass actions against Robbins were known to be false. Moreover, Petitioners' motives were to punish Robbins, not to regulate use of the range, and to obtain something from Robbins that the government was not entitled to get. Flatly stated, BLM officials do not have the authority to regulate, or negotiate, for improper purposes.

A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers. *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). They also lack "inherent authority" to change statutory procedural requirements. *Flint Ridge Devt. Co. v. Scenic Rivers Assoc. of Oklahoma*, 426 U.S. 776, 787 (1976). Internally, the Department of the Interior recognizes that ranchers must be "dealt with fairly" by BLM. *See Hugh A. Tipton*, 55 I.B.L.A. 68, 73 (1981); *Colvin Cattle Co., Inc.*, 39 I.B.L.A. 176, 180 (1979).

Congress conferred wide-ranging powers upon the Secretary of the Interior and his subordinates to carry out the important public purposes of the TGA, FLPMA, PRIA and the other public land laws. Those laws incorporate the protection of and respect for American citizens and their private property that are embedded in the Constitution and all other laws. Persons regulated by and contracting with agencies such as BLM have the right to expect government employees to act even-handedly and to "play by the rules." Government officials must abide by the Constitution and laws of the United States and the rules and procedures of the agency for whom they work. *See Hatahley*, 351 U.S. at 178 ("The [Range] Code is, of course, the law of the range, and the activities of federal agents are controlled by its provisions"). There is absolutely nothing in the TGA or FLPMA, or any other governing federal law, that would allow a federal official to regulate or act arbitrarily or for improper motive or purpose.

## CONCLUSION

*Amici Curiae* urge the Supreme Court to affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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No. 06-219

# In The Supreme Court of the United States

CHARLES WILKIE, et al.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE OREGON CATTLEMEN'S ASSOCIATION AND NEVADA N-6 GRAZING BOARD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

The Oregon Cattlemen's Association and the Nevada N-6 Grazing Board are interested in the question whether the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, bars a plaintiff's Fifth Amendment claim against individual Federal officers under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), where the alleged violations are unrelated to final agency action, and where there is no alternative remedy declared by Congress to be an equally effective substitute for recovery directly under the Constitution.

Formed in Baker, Oregon in 1916, the Oregon Cattlemen's Association represents ranching interests in Oregon. It exists to promote environmentally and socially sound industry practices, improve and strengthen the economics of the industry, and protect industry communities.

The Nevada N-6 Grazing Board represents the interests of Federal and other public lands ranchers in Nevada. The Board advocates on their behalf to ensure that livestock grazing remains a viable use of the Federal lands. It also educates the public about the ranching industry.

In the American West, the Federal Government regulates and is a neighbor to the vast majority of livestock ranching operations. Regular interaction between private individuals and government officials is a way of life. The relationship between the two is ideally and often symbiotic. This case, however, concerns the rare occasion

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[1] This brief is filed with the parties' consent. This brief is authored solely by counsel for *amici curiae*, and no party made a monetary contribution to the preparation or submission of the brief.

where that balance has been lost. It involves a claim by Respondent Frank Robbins, a rancher and entrepreneur, alleging certain Bureau of Land Management (BLM) employees violated his Fifth Amendment rights after he refused to grant the BLM a right-of-way over his ranch. It is for this sort of conduct that this Court held in *Bivens* that citizens may pursue damages against Federal officers.

Affirming the decision below on this issue will clarify the appropriate limits on the relationship between Federal land managers and landowners. Affirming will encourage government officials to discharge their duties according to the law and will give full effect to the guarantees of the Fifth Amendment. Moreover, affirming will contribute to the continued opportunity for harmonious relationships between the government and private landowners. Reversal on this issue, on the other hand, potentially subjects landowners to unchecked unconstitutional conduct by rogue individuals under the color of government authority. Reversal will thereby erode state law and Fifth Amendment protections.

## SUMMARY OF ARGUMENT

The Administrative Procedure Act (APA) does not bar Respondent's *Bivens* claim against the individual agency officers for violations of his Fifth Amendment rights. First, Petitioners have mischaracterized Respondent's claim as solely challenging an agency action. Several of the allegations in Respondent's complaint do not relate to a final agency action. Rather, they concern the extraconstitutional conduct of Federal agency officers, for which the

APA provides no forum for seeking a remedy. Thus, Respondent can only seek damages.

Second, the APA is not the sort of comprehensive regulatory scheme that this Court has held will preclude a *Bivens* claim. The remedial mechanisms of APA judicial review require agency action – something lacking here. Judicial review of those actions is limited to very narrow inquiries that would not disclose the violations alleged by Respondent. Simply because the BLM took some agency actions does not mean that its officers' conduct is necessarily tied to those actions. Much of the conduct complained of would not supply the grounds for setting aside the BLM's formal decisions to revoke the right-of-way and public lands privileges Respondent had previously enjoyed.

Third, in those cases in which the APA has been held to preclude a *Bivens* claim on alternative-remedy grounds, Congress had provided or authorized an underlying regulatory scheme. The APA provided the mechanism for judicial review of decisions resulting from that process. The oft-cited example is that of a Federal employee suing his or her employer for damages associated with alleged constitutional violations connected to employment-related decisions. The employee has a remedial mechanism to seek various forms of relief, which does not typically include damages. If the administrative process leaves the employee dissatisfied, he or she may seek the available remedies in court under the APA. But because they have *some* remedial mechanism, *Bivens* is unavailable. Here, there is no such underlying regulatory scheme that could provide the alternate remedial mechanism. That the APA exists to review agency action is no cause to believe that Congress intended it to foreclose recovery for violations

unrelated to agency action. In such cases, where it is "damages or nothing," this Court has applied *Bivens*.

Finally, this case presents no other "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. At its core, this case is indistinguishable from *Bivens* and the other cases in which this Court and the circuit courts have provided plaintiffs an avenue for seeking relief. Affirming will not impede government officials in the discharge of their duties. Respondent seeks no extension of *Bivens* or any application of it to a new category of defendants. The defendants in this case are in no special position such that permitting a *Bivens* claim to proceed might compromise the ability of BLM officials to perform their duties. Permitting a *Bivens* claim to proceed here will deter any temptation to abuse government authority and will protect important constitutional rights. Thus, when the analysis concludes, *Bivens* is fully applicable.

## ARGUMENT

### The Administrative Procedure Act Does Not Preclude A *Bivens* Claim Alleging Fifth Amendment Violations By Federal Officers Where Those Violations Do Not Relate To Final Agency Action And Where There Is No Alternative Remedy.

In *Bivens*, the Court held that plaintiffs may seek damages from Federal officers for those officers' alleged violations of the plaintiff's constitutional rights. *See Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 (2001) (core holding in *Bivens* recognizes in "limited circumstances a claim for money damages against federal

officers who abuse their constitutional authority"). *Bivens*' purpose was twofold: to deter unconstitutional conduct by Federal officers, *id.*, at 69, and to provide a remedy for constitutional violations where one did not otherwise exist, *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). Relevant here, the Court has articulated two instances in which a *Bivens* claim is unavailable to a plaintiff: (1) when defendants can demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress," and (2) when defendants can prove "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson* v. *Green*, 446 U.S. 14, 18 (1980) (quotations omitted).[2]

Neither situation presents in this case. Indeed, this case presents a context indistinguishable from the contexts presented in the cases where this Court and the circuits have permitted a *Bivens* claim to proceed. As in *Bivens*, as in *Davis*, as in *Carlson*, there is no underlying regulatory scheme for which the APA could provide an alternate, equally effective remedy.

The Petitioners contend, however, that the APA provides all the remedy to which Petitioner is entitled. This argument is fundamentally flawed. The incorrectness of the Petitioners' arguments is found in their mischaracterization of the Respondent's claims, their misinterpretation of this Court's *Bivens* jurisprudence, and their

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[2] The Court noted in *Bivens* that it was not dealing with an explicit prohibition against the relief sought, 403 U.S. at 397, and in *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), the Court noted this as another instance in which a *Bivens* action would be precluded. Petitioners do not claim in this appeal that this justification is applicable.

misapprehension of the regulatory context in which this case finds itself before the Court.

## I. Respondent Alleged Violations By Individual Federal Officers Of His Fifth Amendment Rights, Not Solely That He Is Aggrieved By Agency Action.

Proper characterization of Respondent's allegations is critical to deciding the question addressed in this brief. Petitioners argue that the APA precludes Respondent's *Bivens* claim against the Federal officers in part, because, all of Respondent's claims relate to agency action for which the APA provides the sole mechanism for seeking a remedy. So, the theory goes, the availability of judicial review for agency actions – including those actions found to be contrary to a constitutional right, 5 U.S.C. § 706(2)(B) – precludes a *Bivens* claim. *See Chilicky*, 487 U.S. 412; *Moore* v. *Glickman*, 113 F.3d 988 (9th Cir. 1997) (availability of judicial review under APA precludes *Bivens* cause of action alleging constitutional violations related to agency decision to remove plaintiff from employment position); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146 (9th Cir. 1991) (APA precludes *Bivens* claim against agency rulemakers where, in part, there is "an explicit remedy for unconstitutional rulemaking in the APA"). This theory is premised in part on an erroneous view of the claims Respondent has presented.

It is undisputed that the BLM in this case sought a right-of-way over Respondent's property. And it is undisputed that Respondent refused to grant the BLM a right-of-way. So, Respondent alleged, in an attempt to secure the right-of-way for the BLM, and because they could not do so or chose not to employ the proper means to do so, the

individual officers used various tactics aimed at forcing him to do so. In so doing, Respondent alleged, the officers violated his Fifth Amendment rights. Some agency actions affecting Respondent were taken. The court of appeals noted that these claims were properly pursued in an administrative proceeding. *Robbins* v. *Wilkie*, Pet. App. 82a. However, the court of appeals also noted that several of his claims related to the officers' intentional misconduct that was unrelated to agency action. *Id.* These claims, the court wrote, were "properly within the scope of a *Bivens* claim." *Id.*

This was entirely correct. Despite the Petitioners' contentions, not all of Respondent's claims "relate[] to the same final agency action – the cancellation of the right-of-way granted to respondent's predecessor at the ranch – and to respondent's refusal to grant a reciprocal right-of-way to the government." Brief for Petitioners 33. Nor is the sole basis of his claim the allegation that an agency decision has denied him access to public lands or privileges thereon. *See id.* at 44. Nor can the claims be characterized as non-final agency action. *See id.* at 34 (citing *Bennett* v. *Spear*, 520 U.S. 154, 177-78 (1997)).

First, Respondent's refusal to grant the right-of-way has nothing to do with any agency action. He was not obligated to grant the right-of-way, and the agency did not obtain it. Again, the individual officers allegedly engaged in coercive, extortionate conduct aimed at forcing him to grant the easement. In the process, the individual officers, acting under color of Federal authority, allegedly violated Respondent's Fifth Amendment rights. This conduct is wholly separate from and does not relate to any agency action.

Second, those agency actions that were properly the subject of an administrative proceeding were but small parts of Respondent's claims. The complaint is replete with allegations that other actions by the individual officers infringed upon protected Fifth Amendment rights. These actions are wholly distinct from any agency action.

To the extent Petitioners argue that the conduct at issue in this case somehow relates to non-final agency action, Brief for Petitioners 34, this, too, is incorrect. The conduct complained of here would not lead to any agency action that could be reviewed. The Court explained the concept of finality in *Bennett* v. *Spear*, stating that the action must "lead to the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature . . . [a]nd second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 177-78 (citation omitted). No agency action would flow from the alleged constitutional violations. The alleged conduct stems from Respondent's refusal to grant an easement over his land. Simply because the conduct involved agency officers who may have been involved in the BLM's decision to cancel Respondent's right-of-way and public lands privileges does not magically transform the officers' conduct into agency action. The cancellation of Respondent's right-of-way and his privileges on public lands are merely collateral, unrelated acts by the BLM.

BLM officials are, of course, authorized to seek reciprocal rights-of-way from landowners in exchange for a right-of-way over public lands. Mere proximity to Federal land does not bring the landowner within the sphere of BLM regulation. In this sense Respondent is not an employee whose relationship with a Federal employer is

governed by an elaborate administrative scheme designed to remedy constitutional violations. *See Bush* v. *Lucas*, 462 U.S. 367, 386 (1983) (Federal employee's *Bivens* claims precluded by elaborate administrative system created by Congress which "provide[d] meaningful remedies for employees who may have been unfairly disciplined. . . ."). Nor was the conduct related to a regulatory scheme that produced an adverse decision against Respondent. *See, e.g., Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006) (denying *Bivens* claim for alleged unconstitutional acts connected to adverse inspection decisions). Therefore, only the Constitution protects Respondent from abusive government conduct, just as the Constitution was the sole protection in *Bivens*, *Davis*, and *Carlson*. If BLM officials may enjoy unchecked disregard of landowners' constitutional rights, the protections embodied in the Constitution become effectively meaningless. The allegedly coercive or extortionate conduct effectively thus becomes a legitimate tool in BLM's belt. This is precisely what *Bivens* was designed to protect against.

## II. The APA Makes Reviewable Only Agency Actions, Not Actions For Constitutional Violations Against Individual Government Officers, Where That Conduct Is Unrelated To Agency Action.

Petitioners assert that the APA provides the sort of "comprehensive scheme for challenging agency action that precludes a *Bivens* remedy with respect to challenging *agency actions* like those at issue here." Brief for Petitioners 31 (emphasis added). They add that the absence or limited nature of a remedy under the APA does not necessarily

mean that *Bivens* should be available to provide one. *Id.* at 34-35. As a general statement, this may be true. Before the availability or nature of a remedy becomes relevant, it first must be asked whether the APA even provides Respondent the forum to seek any remedy. The answer is, of course, no.

The APA makes reviewable two types of actions: (1) "[*a*]*gency action* made reviewable by statute" and (2) "final *agency action* for which there is no adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). "Agency action," as it is defined in the APA, "includes the whole or part of an *agency* rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13) (emphasis added). The APA directs a court to "hold unlawful and set aside *agency action*, findings, and conclusions" found to be contrary to constitutional right. 5 U.S.C. § 706(2)(B) (emphasis added). So, by its plain text, the APA allows review only of *agency action* for which there is no adequate remedy in court.

Because APA review is limited to review of agency action, it follows that APA review does not include claims against officers whose conduct is unrelated to an actual agency decision. Thus, *Bivens* provides a forum for a plaintiff to seek damages. *Collins* v. *Bender*, 195 F.3d 1076 (9th Cir. 1999), illustrates this distinction. *Collins* was brought by a Drug Enforcement Agency employee placed on administrative leave due to allegations of potentially dangerous conduct. 195 F.3d at 1077. Upon commencement of Collins' leave, Collins' supervisor, Bender, ordered DEA agents to retrieve from Collins' home government property and Collins' personal firearms. *Id.* Collins was eventually terminated. *Id.* In his *Bivens* complaint, Collins alleged that the agents violated certain of his constitutional rights. *Id.*

Bender, the supervisor, claimed that the search was part of a "personnel action," for which a remedy would lie pursuant to the Civil Service Reform Act. *Id.* at 1078. The district court agreed. *Id.* The court of appeals reversed, holding that the definition of "personnel action" did not include the search of the employee's home for his personal property. *Id.* at 1080. In other words, simply because there was some relationship, parts of which were covered by the CSRA, not every act done by supervisor to employee was so covered.

Importantly, the court observed that "Congress intended for the CSRA to be the sole mechanism through which employment disputes are settled," not to "deputize government supervisors as chieftains of security forces that police the private lives of their employees subject only to some administrative oversight" or to "shoehorn into the CSRA every odd occurrence where a supervisor forms and leads such a renegade posse." 195 F.3d at 1080.

Other courts, in different but analogous contexts, have also noted the distinction between conduct related to agency action and conduct not related to agency action. *See Zephyr Aviation, LLC* v. *Dailey*, 247 F.3d 565, 571-72 (5th Cir. 2005) (declining to impose judicial exhaustion requirement on plaintiff's *Bivens* claim of extra-procedural and unconstitutional actions by FAA inspectors where conduct complained of did not "implicate an FAA order that is currently in place" and where administrative appeal process would not provide the relief sought);[3]

[3] The court noted that based on the pleadings, the only question was whether the Aviation Act required a plaintiff to exhaust administrative remedies before filing a *Bivens* claim, and not whether it displaced a *Bivens* claim altogether. 247 F.2d at 570 n.5.

*Americopters, LLC* v. *Federal Aviation Administration*, 441 F.3d 726, 737-38 (9th Cir. 2006) (declining to apply collateral attack doctrine on plaintiff's constitutional claims against FAA where no order was then pending, noting that "[a] damages claim in district court is not fairly characterized as an 'end-run' around an order – or the procedures and merits surrounding it – if the order is no longer pending or, for lack of a better word, 'live'"); *Ballasteros* v. *Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006) (REAL ID Act limited Federal district court's review of Board of Immigration Appeals' removal orders, and "no remedy for the alleged constitutional violations would affect the BIA's order for removal," therefore, the court could not consider Fourth Amendment claim – "[a]ny remedy available would lie in a *Bivens* claim"); *District Props. Assocs.* v. *The District of Columbia*, 743 F.2d 21, 26 (D.C. Cir. 1984) (where District of Columbia APA granted review to "affirm, modify, or set aside the order or decision complained of," claims against agency officials that were "relatively unrelated to the formal decisionmaking process" were outside scope of judicial review provision).

Much like in the cases just cited, the conduct at issue in this case would not supply any grounds for setting aside the BLM actions. Assuming the actions at issue are the BLM's cancellation of the right-of-way and Respondent's other public lands privileges, the nature of judicial review would provide no forum for the constitutional violations to be addressed. Judicial review is confined to the record. *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-32 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). The APA provides no opportunity for discovery, no trial, and no introduction of evidence beyond what the agency compiled during its decisionmaking

process. To the extent the Petitioners claim that the IBLA would provide a forum for the constitutional claims to be addressed, this is incorrect. The IBLA does not have jurisdiction to consider Fifth Amendment violations against agency officers where that conduct is not connected to an agency action. It decides appeals to the Department of the Interior from decisions related to the use and disposition of public lands and their resources, and a handful of items not relevant in this case. *See* 43 C.F.R. § 4.1 (2006). IBLA panels have declined to consider constitutional claims or provide relief for alleged violations by officers of individuals' constitutional rights. *See Rivers Edge Trust*, 166 IBLA 297 (2005) ("the Board, as a quasi-judicial body within the Department of the Interior, has no authority to adjudicate whether constitutional rights have been violated, or to afford any relief therefrom"); *see also United States* v. *Miller*, 165 IBLA 342 (2005); *Rainer Huck, et al.*, 168 IBLA 365 (2006); *Organized Sportsmen of Lassen County*, 124 IBLA 325 (1992); *Laguna Gatuna, Inc.*, 131 IBLA 169 (1994); *Carey Horowitz*, 138 IBLA 330 (1997).

Because the administrative adjudicatory body could not hear the claims or provide any relief, the district court, reviewing the administrative record, would also not be able to hear the claim or provide relief. *See Transcontinental Gas Pipe Line Corp.*, 423 U.S. at 332 ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Hence, the APA presents no option for bringing Respondent's claims or evidence, let alone an alternate remedy.

## III. There Is No Underlying Comprehensive Regulatory Or Remedial Scheme For Which The APA Could Provide A Remedy Or Be Viewed As An Equally Effective Substitute For Recovery Directly Under The Constitution.

A coherent theme strings together the decisions of this Court and the circuits declining to extend *Bivens*: the existence of an underlying regulatory scheme which includes the availability of judicial review. Justice O'Connor captured this theme in *Chilicky* and summarized it thusly: "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." 487 U.S. at 423. It is this theme the Petitioners say is present here. According to them, APA is yet another example of a comprehensive regulatory scheme with remedies – however inadequate – that precludes a *Bivens* claim.

Petitioners' argument fails here. Petitioners point out that section 706(2)(B) of the APA allows a court to set aside agency action that is contrary to a constitutional right. They argue that "Respondent was entitled, therefore, to raise any constitutional challenge he may have had to petitioners' actions in a suit of judicial review under the APA. . . ." Brief for Petitioners 35. But it is clear that Respondent could not have invoked the jurisdiction of the Federal district courts because there was no action to review. Additionally, the APA is far from the comprehensive regulatory scheme that this Court and the circuits hold will preclude a *Bivens* claim. The Petitioners' argument otherwise is flawed for two reasons. First, the APA is

not a stand-alone regulatory scheme that would provide the alternative remedy necessary to preclude a *Bivens* claim, and no authority cited by the Petitioners relied solely on the APA to preclude a *Bivens* claim. Second, the APA is not the remedial component of an underlying regulatory scheme, which is present in – and critical to – every single case the Petitioners cite.[4]

The Petitioners claim that "those circuits that have confronted the issue have held that the availability of relief under the APA generally precludes a *Bivens* action for damages." Brief for Petitioners 31. That is not the complete story. Petitioners argue also that "when a comprehensive statutory remedial scheme exists, it does not matter whether a particular plaintiff will have a remedy under that scheme." *Id.* at 31. This is true, but it does not apply to this case: There is no comprehensive statutory remedial scheme. In each case the Petitioners cite, there existed an underlying regulatory scheme, and the agency decisions which encompassed the complained-of conduct produced as part of that scheme were subject to judicial review under the APA. The fact in some of those cases that the remedy was in plaintiff's mind less desirable did not change the analysis. Because Congress had provided an alternative remedy, which it viewed as equally effective, the lack of plaintiff's desired remedy was no reason for the court to create one for them.

In *Sinclair* v. *Hawke*, 314 F.3d 934 (8th Cir. 2003), the court followed *Bush* v. *Lucas* and *Schweiker* v. *Chilicky*,

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[4] To the extent the Petitioners argue that the Interior Board of Land Appeals (IBLA) provides the underlying remedial scheme for hearing complaints like Respondent's, this is incorrect. IBLA jurisdiction is quite limited. *See* discussion of IBLA jurisdiction, *supra*.

and dismissed a *Bivens* action by the owner of an insolvent bank against the Comptroller General. The court held that the comprehensive regime regulating banks, plus the availability of APA judicial review for adverse decisions precluded the suit. 314 F.3d at 942. Similarly, in *Nebraska Beef, supra*, the court dismissed a *Bivens* claim, in part, because "the USDA has promulgated a comprehensive regulatory scheme pursuant to the [Federal Meat Inspection Act] that includes the right to judicial review under the APA." 398 F.3d at 1084. In *Miller* v. *United States Dep't of Agric.*, 143 F.3d 1413 (11th Cir. 1998), the court held that *Bivens* was unavailable to a Federal worker challenging his termination decision because that termination decision was subject to judicial review under the APA. 143 F.3d at 1416. In *Sky Ad, supra*, the court denied a *Bivens* remedy "because the presence of an explicit remedy for unconstitutional rulemaking in the APA, Congress' rejection of tort remedies for unconstitutional rulemaking in the [Federal Tort Claims Act], and the overall unprecedented nature of appellants' tort theory" supplied the special factors counselling hesitation. 951 F.2d at 1148. In *Sky Ad*, the rulemaking provisions of the APA were the underlying regulatory scheme. The APA provided for review of unconstitutional rulemaking. There is no corresponding scheme in this case.

It is clear that the absence or imperfectness of a remedy will preclude a *Bivens* claim when there is a comprehensive regulatory scheme in place. In *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272 (10th Cir. 1991), the court denied *Bivens* relief because "Congress has provided a comprehensive procedure to address postal employees' constitutional claims arising from their employment relationship with the USPS. . . ." 951 F.2d at

275-76. *Jones* v. *TVA*, 948 F.2d 258 (6th Cir. 1991), held similarly that as a TVA employee covered by the Civil Service Reform Act, the plaintiff's *Bivens* claim was barred. 948 F.2d at 264. The court noted that "even if no remedy at all has been provided by the CSRA, courts will not create a *Bivens* remedy." *Id.* This statement came in the context of *some* remedial structure.

In *Moore* v. *Glickman, supra*, the Ninth Circuit refused to apply *Bivens* to an employee whose termination decision was subject to APA review. Again, however, the APA was not the sole regulatory scheme at issue. There was an elaborate administrative scheme under which the employee could seek review of the termination decision. The fact that the employee thought the available remedies incomplete was of little effect, however, since the administrative system provided "an alternative scheme and some indication that Congress deliberately elected not to include complete relief." 113 F.3d at 994 (quoting *Chilicky*, 487 U.S. at 423). And in *Saul* v. *United States*, 928 F.2d 829 (9th Cir. 1991), *Volk* v. *Hobson*, 866 F.2d 1398 (Fed. Cir. 1989), cert. denied, 490 U.S. 1092 (1989), and *Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), there existed *some* administrative mechanism for addressing complaints of constitutional violations. Here again, however, neither the APA nor any other regulatory scheme has been provided.

The circuits have properly grasped the distinction between claims for which *Bivens* is available, and those for which it is not. In *Chilicky*, for instance, Congress had provided social security disability claimants with a fairly extensive administrative appeals process, which included the right of judicial review. *See* 487 U.S. at 424. Thus, a claimant could assert constitutional violations in an effort

to recover benefits. *Id.* Because Congress had spoken to the matter of remedies, the Court deferred to that body's judgment.

The Court's explanation of the issue in *Bush* v. *Lucas*, 462 U.S. 367 (1983), clearly identifies the relevant inquiry:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

*Bush*, 462 U.S. at 388. In *Bush* the Court declined to provide a *Bivens* cause of action to a Federal employee because his claims "ar[ose] out of an employment relationship that [was] governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States. . . ." 462 U.S. at 368. After being reassigned, the employee made several statements that were "highly critical of the agency" with which he was employed. *Id.* at 369. He was demoted. *Id.* at 370. The employee pursued the administrative appeal process, and was eventually reinstated with full back pay and retroactive seniority. *Id.* at 372. Under the law then in effect, he could have sought judicial review had the administrative process not resolved in his favor. *Id.* at 387. *Bivens* was unavailable to the plaintiff, "[g]iven the history of the development of civil service remedies and the comprehensive nature of the remedies currently available. . . ." 462 U.S. at 388.

Contrast *Bush* and *Chilicky* with *Davis* v. *Passman*, *Carlson* v. *Green*, and *Bivens* itself. In *Davis*, the terminated employee had no congressionally-provided remedial mechanisms: "When § 717 was added to Title VII to protect Federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service." *Davis*, 442 U.S. at 247. Importantly, the Court observed that "of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Id.* at 248. In *Carlson*, the Court found that even with the existence of the Federal Tort Claims Act, *Bivens* remained available to a plaintiff seeking damages for Eighth Amendment violations.[5]

*Bivens* counsels a similar result. Mr. Bivens alleged that agents of the Federal Bureau of Narcotics, acting under claim of Federal authority, entered his abode, arrested him, manacled him in front of his wife and children, and threatened to arrest the whole family. 403 U.S. at 389. The agents then took Mr. Bivens to the courthouse, interrogated him, booked him, and subjected him to a visual strip search. *Id.* In holding in Mr. Bivens' favor, the Court identified, among other rationales, the fact that the Court faced no "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397. Congress had provided no such remedy. As

[5] It does not appear from the opinion that there was any underlying regulatory scheme designed by Congress to provide a remedial mechanism for those violations.

Justice Harlan put it, "[f]or people in *Bivens*' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

This Court's cases instruct that where there is no underlying regulatory scheme, where there is no congressionally provided alternative remedy – where it is "damages or nothing" – *Bivens* affords plaintiffs the opportunity to seek a remedy for constitutional violations. Even in the cases declining a *Bivens* remedy, the Court has noted that where it is "damages or nothing," *Bivens* is available. *See Malesko*, 534 U.S. at 69; *Chilicky*, 487 U.S. at 425-27. It was, in significant part, *because* of the existence of an alternative remedy that *Bivens* was unavailable for the plaintiffs in *Bush* and *Chilicky* and *Malesko*.

As the court of appeals observed in this case, some of the events involved agency actions for which *Bivens* was unavailable. But for other conduct, no congressionally-provided scheme regulated the relationship between Respondent and the BLM officials. In such a case, *Bivens* is available to vindicate the important protections at stake.

## IV. There Are No Other "Special Factors Counselling Hesitation In The Absence Of Affirmative Action By Congress."

Neither the existence of the APA, nor the position of the Petitioners, nor anything about this case provides the "special factors counselling hesitation in the absence of affirmative action by Congress." First, applying *Bivens* here is hardly the radical expansion of *Bivens* "in direct contravention of this Court's precedents and principles of judicial restraint" as claimed by Petitioners. Indeed, it is fully consistent with this Court's *Bivens* jurisprudence.

There is no alternate remedy nor any underlying regulatory scheme that would indicate Congress intended the APA to substitute for recovery directly under the Constitution.

Second, a holding of this Court that the APA does not preclude Respondent's *Bivens* claims will not impede BLM officials as they discharge their duties any more than Mr. Bivens' claim against the narcotics officers impeded law enforcement officials' ability to discharge theirs. Claims that if this Court affirms the court of appeals' decision, government officials will become "reticent" or "downright afraid" to perform their job duties, *see* Brief of *Amici Curiae* National Wildlife Federation, et al. 5, are simply unfounded. Qualified immunity still exists for those agents who operate within the bounds of the law, and this is an appropriate safeguard. *See Carlson*, 446 U.S. at 19.

Third, in the vast expanse of the West, personal relationships necessarily develop between agency officials and landowners. BLM officials in the West often live in or near the very communities in which the ranchers live. This relationship provides the deterrence justification articulated in *Carlson*. Not only will a government official be more likely to conform his or her conduct to the Constitution, *Carlson*, 446 U.S. at 21, but, perhaps, if each person, landowner and government official alike, knows he or she is personally accountable, mutual respect has a better chance of prevailing.

Finally, the interests at stake far outweigh the potential liability officials might face. *Bivens* acts as a check on abusive governmental behavior where one does not otherwise exist. Allowing a *Bivens* claim to proceed here will say nothing to government officials except that they must

conform their actions to the Constitution, as must every other Federal employee. *See Davis*, 442 U.S. at 246 ("All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it") (quoting *Butz* v. *Economou*, 438 U.S. 478, 505 (1978)) (internal quotation omitted).

## CONCLUSION

In a case such as this, where there is no underlying regulatory scheme, where the APA provides no alternative remedy for the violations alleged, and where there are important constitutional protections at stake, *Bivens* is the only mechanism available to vindicate those rights. Affirmance requires no extension of *Bivens* and no application of it to a new set of defendants. Therefore, the APA does not preclude Respondent's *Bivens* claim. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 06-219

In the

# Supreme Court of the United States

CHARLES WILKIE, et al.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WASHINGTON FARM BUREAU, AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT HARVEY FRANK ROBBINS

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## QUESTIONS PRESENTED

1. Whether the Fifth Amendment protects the right of the people to exclude government agents from their private property.

2. Whether the right to exclude government agents from private property necessarily includes a prohibition against governmental retaliation for the exercise of that right.

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## IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Washington Farm Bureau, and the Wyoming Farm Bureau Federation submit this brief amicus curiae in support of Respondent Harvey Frank Robbins.[1] All parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the fundamental right to own and make use of private property for over 30 years. PLF attorneys have appeared before this Court as counsel of record in *Rapanos v. United States*, __ U.S. __, 126 S. Ct. 2208 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by the Court in the past 25 years. PLF believes that its litigation experience will provide a valuable additional viewpoint on the issues presented in this case.

The Washington Farm Bureau is a Washington organization consisting of almost 30,000 productive and politically active families, speaking out on issues of concern to rural America. Formed in 1920, as part of the American Farm Bureau Federation, the Washington Farm Bureau is the largest trade association in the State of Washington.

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Wyoming Farm Bureau Federation represents agricultural producers throughout the State of Wyoming, many of whom have federal grazing permits as well as private properties which are intermingled with public lands. The issues surrounding this case have a direct bearing on its members.

The Farm Bureaus' members, primarily small property owners, are frequently subject to government regulation and are thus gravely concerned about the Petitioners' assertions that property owners may not exclude the government from private property. The Farm Bureaus believe that landowners adjacent to federal land should not be forced to allow easements across their land, and that trespass—particularly by federal agents—must be taken very seriously and vigorously opposed.

## SUMMARY OF ARGUMENT

This case turns on the question of whether Petitioners, agents of the Bureau of Land Management (BLM), should have known that they violated a property owner's Fifth Amendment rights when they conducted a campaign of harassment and intimidation designed to induce him, against his will, to grant BLM an easement across his property. Petitioners argue that they should be granted immunity from Mr. Robbins' claims against them because, *inter alia*, they believe there is no constitutional right to exclude government agents from private property. *See* Brief for the Petitioners (Pet. Brf.) at 40-44. Moreover, even if such a right exists under the Fifth Amendment, Petitioners argue that there is no well-established right to be free of governmental retaliation for the exercise of that right. Pet. Brf. at 37-40.

Petitioners' arguments are based on a disturbing and mistaken understanding of the relationship between the American people, their government, and constitutional protections of private property rights. The Framers of the Constitution accorded great weight to the importance of private property as a bulwark of personal sovereignty and autonomy,

which not even the power of government could breach except in limited circumstances, such as through the exercise of eminent domain. The most essential strand in the bundle of rights that comprise property is the right to exclude, and the right to exclude the government is arguably the most essential filament of that strand.

If the government were allowed to retaliate against citizens who exercise their right to exclude government agents from their land, the right itself would be extinguished. In that sense, recognizing a non-retaliation component to the rights guaranteed by the Fifth Amendment is even more crucial than in the more familiar context of First Amendment rights. This Court has implicitly recognized this fact in its extension of the unconstitutional conditions doctrine to rights secured under both the First and Fifth Amendments.

Finally, Petitioners err when they characterize the Fifth Amendment as merely providing a remedy for governmental intrusions that rise to the equivalence of formal expropriations of property. *See* Pet. Brf. at 41-44. To the contrary, the Amendment recognizes a substantive right that inheres in the people and predates the Constitution—the right to possess and enjoy the use of one's private property without unauthorized intrusions and invasions, *especially* by the government and its agents.

## ARGUMENT

### I

### THE FIFTH AMENDMENT RIGHT TO EXCLUDE THE GOVERNMENT FROM PRIVATE PROPERTY IS WELL ESTABLISHED

This case arose from a simple exercise by Respondent Frank Robbins of the personal liberties recognized and protected by the United States Constitution. When agents of the federal Bureau of Land Management asked him to grant the government an easement over his private land, Mr. Robbins said "no." *See Robbins v. Wilkie*, 433 F.3d 755, 760 (10th Cir. 2006).[2] Thereafter, according to Mr. Robbins' complaint, the agents initiated and conducted a campaign of harassment and intimidation designed to coerce him into conveying the easement. These retaliatory measures included trespassing on Robbins' property, refusing to maintain the access road to Robbins' ranch; threatening to cancel, and then cancelling, Robbins' existing rights-of-way, recreation use permit, and grazing rights; interfering with the conduct of Robbins' guest-ranch business; bringing unfounded criminal charges against Robbins, and threatening to "bury" him. *Id.* Instead of yielding to these coercive tactics, Mr. Robbins filed suit against the agents, stating claims under RICO and *Bivens*.

Before this Court, Petitioners argue that they should be granted immunity for their extortionate conduct because, *inter alia*, Mr. Robbins has no "clearly established" constitutional right to exclude federal agents from his property. Pet. Brf. at 43. Such a right is not clearly established, according to Petitioners, because the Constitution does not expressly "confer" the right to exclude government agents from private

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[2] All references in this brief to the opinion below will be to the version reported in the Federal Reporter at 433 F.3d 755.

land. *Id.* at 14-15, 44. This position reflects a deeply troubling misunderstanding of America's constitutional tradition and the relationship between the government and the governed in our constitutional order.

### A. Private Property Rights Are Accorded Special Solicitude by the Constitution Because They Are Fundamental to the Preservation of Individual Liberties

Contrary to Petitioners' understanding, the Constitution is not a positive source of law that grants American citizens those rights and freedoms the government deigns to allow them. Rather, the document conveys specified, limited powers *from* the people *to* the federal government. *See, e.g., United States v. Lopez*, 514 U.S. 549, 556 (1995) ("Congress' authority is limited to those powers enumerated in the Constitution."). At the same time, the Constitution expressly recognizes some—though by no means all—individual rights understood to inhere in the people, which the government may not interdict. *See* U. S. Constitution, Amendment IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Thus, the fact that the Constitution does not expressly "confer" a particular right does not mean that such a right is not clearly established and protected. Rather, the test is whether a reasonable person should know that specific governmental conduct violates a citizen's rights. *See, e.g., Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995).

The special importance to the Founders of secure rights of private ownership and control of property cannot be overstated. "Throughout the revolutionary era, Americans emphasized the centrality of the right to property in constitutional thought. 'The right of property,' Arthur Lee of Virginia declared, 'is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'" James W. Ely, Jr., *The*

*Guardian of Every Other Right* 26 (1992) (citation omitted). *See also* Bernard H. Siegan, *Property and Freedom* 14 (1997) ("the Framers supported protection of property rights as essential both to the fulfillment of the human condition and to the advancement of the society"); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 Sw. U. L. Rev. 627, 638 (1988) (explaining that, "[t]o the Framers, identifying property with freedom meant that, if you could own property, you were free").

The drafters of the Constitution were strongly influenced by the philosophy of John Locke, who demonstrated that rightful governmental authority serves to protect individual liberty largely by securing rights to private property. *See* John Locke, *Second Treatise of Government* 66 (S.W. Gough ed., Oxford 1966) (1690). Accordingly, the Federalists famously sought to ratify the new Constitution in order that the American State could provide "additional securities to republican government, to liberty, *and to property*." Alexander Hamilton, *The Federalist No. 85*, in George W. Carey & James McClellan, eds., *The Federalist* 452, 452 (2001) (emphasis added). As Madison saw it, "Government is instituted to protect property of every sort." James Madison, *Property*, quoted in *Winstar Corp. v United States*, 25 Cl. Ct. 541, 548 (1992).

The Framers spoke so adamantly to this issue because they understood that private property rights are the concrete expression of a free political order. They did not provide constitutional protections for property "for its own sake, but because it was the central invention by which a liberal regime recognized the freedom of the individual." Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 Cath. U. L. Rev. 817, 829 (1993); *see also* Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2002) (the Framers recognized that "principles of good government

started with the protection of private property—that guardian of all other rights."). Only a year after the Constitution was adopted, John Adams expressed the Framers' universally shared view that "'[p]roperty must be secured or liberty cannot exist.'" *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., Boston, Little Brown 1851), quoted in *Cannon v. Delaware*, 807 A.2d 556, 569 (Del. 2002).

This centrality to the Framers of the importance of secure property rights explains why, as was noted earlier this month by the Maryland Court of Appeals:

> The framers of the Federal Bill of Rights did not place the property rights clause in some obscure part of these documents. It was placed in an amendment considered by many to be among the most important sections of that foundation stone of our form of democracy. It is found in the Fifth Amendment, included with the double jeopardy clause and the privilege against coerced self-incrimination in criminal cases clause. U.S. Const. amend. V. Immediately alongside those cornerstones of our democracy lies the property rights clause: "No person shall . . . be deprived of life, liberty, or property *without due process of law*; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added). Reverence is due the property rights clause just as is due the other great provisions of the Fifth Amendment. It is a fundamental right.

*Mayor of Baltimore v. Valsamaki*, ___ A.2d ___, 2007 WL 415356 (Md.), Feb. 8, 2007, slip op. at 36-37.

For well over 200 years, this Court, like the Founders, has recognized that private property is the cornerstone of a free society. More than a century after the Constitution's adoption, this Court noted without citation the common-sense proposition

that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893).

This Court has further recognized that

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). And this Court has reiterated its understanding that the rights accorded to ownership of private property are "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

### B. The Right to Exclude Others Is the Most Essential Stick in the Bundle of Rights That Comprises Property

The right to exclusive possession and occupation of property is fundamental to the concept of ownership itself: "[T]o the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753

(1998). The centrality of this right has been understood since the dawn of property law:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world *in total exclusion of the right of any other individual in the universe.*

William Blackstone, 2 *Commentaries on the Laws of England* 2 (1766) (emphasis added).

This Court has consistently recognized the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Commission*, 483 U.S. at 834. Accord, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the right to exclude is "universally held to be a fundamental element of the property right"). More recently, this Court has characterized the right to exclude as the "hallmark of a protected property interest." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999).

Wyoming, the site of Mr. Robbins' property and the events at issue in this lawsuit, has recognized the right to exclude as a fundamental right since before it was admitted to the Union in 1890. See *Territory of Wyoming v. Conley*, 2 Wyo. 331, 1880 WL 5024, at *7 (1880). At least as early as 1896, Wyoming courts entertained actions for trespass which they defined as "wrongfully continu[ing] upon the land." *Caldwell v. Bush*, 46 P. 1092, 1092 (Wyo. 1896). More recently, the state's Supreme Court has reiterated that "[o]wnership of property . . . , includes the right to exclude others." *Maryland v. Flitner*, 28 P.3d 838, 848 (Wyo. 2001). As the Petitioners in this case must have been fully aware, a

Wyoming property owner "exercises full dominion and control over the land and possesses the right to expel trespassers." *Id.*

### C. The Right to Exclude Others from Private Property Has Always Been Understood to Apply to Government Agents

Contrary to Petitioners' contention, the universally recognized right to exclude contains no exception for government agents. "[T]he right to exclude applies to *both government and private activity* on private land, whether the activity is the result of governmental attempts to secure a public interest or of theories associated with stronger rights emanating from custom and public trust." David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 41 (2000) (emphasis added). This Court has recognized that the owner of private property "has a right to exclude from it all the world, *including the Government*." *United States v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring) (emphasis added). The lower courts have similarly understood that the right to exclude others from one's property applies "*especially* [to] the Government." *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (emphasis added):

> The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.

*Id.* at 1375.

In the face of this strong and uniform authority, it is simply implausible to assert that Petitioners could not have

known that Mr. Robbins had a well-established constitutional right to exclude the government from his land.

## II

## THE RIGHT TO BE FREE OF GOVERNMENTAL RETALIATION FOR THE EXERCISE OF ONE'S FIFTH AMENDMENT RIGHTS IS WELL ESTABLISHED

The court of appeals correctly found that Petitioners' retaliatory campaign of harassment and intimidation, designed to coerce Mr. Robbins into yielding an easement to the government, violated Mr. Robbins' Fifth Amendment rights. 433 F.3d at 764-67. Petitioners argue that, because no previous appellate opinion has *explicitly* recognized the right to be free from retaliation for the exercise of Fifth Amendment rights, no "reasonable officer" would have understood that such a right exists. Pet Brf. at 37, 48. Thankfully, until now no court has been required to make such a finding, because the right not to be harassed and intimidated for exercising one's right to exclude the government is self-evident in the very concept of private property, on which our free society rests.

As set forth above, America's Founders afforded special constitutional protections to private property rights not for their own sake, but in recognition of the intimate relationship between property ownership and individual liberty. Secure rights of private ownership afford the individual a sphere of personal autonomy and security which not even the government may breach, save only through a lawful exercise of the power of eminent domain. This cherished measure of human dignity predates the Constitution, as was recognized in the famous aphorism of Sir William Pitt in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the

> storm may enter—the rain may enter—*but the King of England cannot enter*; all his forces dare not cross the threshold of the ruined tenement.

William Pitt, Earl of Chatham, Speech on the Excise Bill, *quoted* in *United States v. Nelson*, 459 F.2d 884, 885 (6th Cir. 1972).

As Pitt's choice of imagery suggests, this historical right of Englishmen, recognized by the American Constitution, is one that may readily be overcome by force or coercion. In contemporary parlance, the exercise of one's right to exclude the government is easily "chilled" if—as in the case at bar—citizens must fear the lash of retaliation if they dare to exercise it.

There are obvious parallels between this situation and those in which this Court has expressly recognized the inherent right of the people to be free from governmental retaliation. As Petitioners acknowledge, the implicit constitutional protection against retaliation has been noted frequently in the First Amendment context. *See* Pet. Brf. at 37-38. As this Court held in one such case,

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.

*Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citations omitted). The infringement involved in *Perry* was the retaliatory termination of an at-will employment contract. This Court held that such a denial would violate Robert Sindermann's First Amendment rights if he could show that the action was taken in retaliation for Sindermann's prior public

criticisms of the school administration. The Court's rationale was straightforward:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

*Id.* (citation omitted).

Replace the words "speech or associations" in this passage with "right to exclude the government," and the Court's holding in *Sindermann* is fully applicable to the case at bar. Petitioners do not suggest that Robert Sindermann's actions were any more praiseworthy than Frank Robbins'—both men simply chose to assert against the government the rights guaranteed to all citizens by our Constitution. Nor can Petitioners plausibly maintain that Sindermann (an experienced professor with a wide selection of schools at which he could be employed) was more seriously injured by the government's retaliation than was Robbins (a small rancher whose livelihood depends on the property at issue here). Rather, Petitioners distinguish *Sindermann* and related cases solely on the basis of the specific constitutional provision under which they arose. Pet. Brf. at 37-40.

This distinction is important, Petitioners assert, because "the concerns about chilling protected activity that motivate the anti-retaliation doctrine in the First Amendment context are not present, or at least are greatly reduced, in the Fifth Amendment takings context." Pet. Brf. at 38. No authority is given for this proposition; and in fact, the opposite conclusion is at least equally compelling. If an employment contract is not renewed because of a teacher's expressive conduct, that teacher may well be more guarded in his or her future public communication—that is, the teacher's exercise of First Amendment rights may be

chilled. But if the government is allowed to pursue a course of harassment and intimidation because a citizen asserts his property rights against government agents, those rights are not simply chilled, *they are effectively destroyed.*

As has been noted above, the defining characteristic of property rights is that they provide a locus of security, privacy, and personal autonomy against even the highest authority, which cannot be breached except through specified, lawful procedures. When governmental retaliation for the assertion of those rights takes the form it did here, the right of property itself is reduced to no more than a formality of title; the essence of the right is extinguished. (In this, the right to exclude the government from private property shows a clear affinity with that other bastion of Fifth Amendment liberties, the right not to be required to give testimony against oneself. In both instances, the application of governmental coercion against those who assert the right destroys the essence of what is to be protected. *See, e.g., Diminnie v. United States*, 728 F.2d 301, 307 (6th Cir. 1984) (citizen may not be prosecuted in a civil action "for exercising his constitutional right to remain silent").) Thus, the rationale for recognizing a non-retaliation component to the guarantees of the Fifth Amendment is in this sense even stronger than that for rights secured by the First Amendment. *Cf.* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 89 (2001) (reviewing application of the unconstitutional conditions doctrine in First and Fifth Amendment contexts and noting, "the Supreme Court has come closer to grasping the essential logic of coercion in its takings decisions than anywhere else.").

Finally, although this Court has not had occasion to expressly recognize the right to non-retaliation as implicit in the Fifth Amendment, the concept is fairly included in the doctrine of unconstitutional conditions, which has been applied uniformly in both First and Fifth Amendment contexts. In

*Dolan v. City of Tigard*, a land-use case, this Court evaluated the constitutionality of a regulatory exaction under substantially the same test as it applied in *Sindermann*, holding that landowners may not be required to give up a constitutional right in exchange for a "benefit conferred by the government." *Dolan*, 512 U.S. at 385 (citing *Perry v. Sindermann*). Indeed, Justice Stevens in dissent drew attention to the majority's apparent equating of Fifth Amendment and First Amendment interests, for purposes of applying the unconstitutional conditions doctrine. *See id.* at 407 (Stevens, J., dissenting). *See also* Rodney A. Smolla, *Doctrine of Unconstitutional Conditions: Rough Proportionality Standard of Dolan v. City of Tigard*, 1 Smolla & Nimmer on Freedom of Speech § 7:14 (database updated October, 2006) (speculating on the extent to which *Dolan* "can be exploited in civil rights and civil liberties cases, striking down conditions imposed by the government that limit the exercise of non-property rights, such as the free exercise of religion or freedom of expression").

Petitioners argue that the *Dolan* doctrine has no application here, in part because the government's coercive tactics failed to effect "an actual interference with property owned by the private citizen." Pet. Brf. at 47. This argument, however, rests on an indefensibly narrow and formalistic understanding both of property rights, and of the "benefits" Petitioners' actions were designed to withhold from Mr. Robbins.

Mancur Olson demonstrated that secure property rights become of fundamental importance as soon as society progresses beyond the structural dominance of roving bandit gangs and adopts rudimentary governmental institutions. *See* Mancur Olson, *Power and Prosperity* 34-43 (2000). This proposition was not in doubt among the English jurists who laid the groundwork for our Constitutional protections. *See, e.g.*, *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765) ("The great end, *for which men entered into society*, was to

secure their property.") (emphasis added). But this security is the very "governmental benefit" Petitioners sought to withhold from Mr. Robbins unless he forfeited his right to exclude federal agents from his land! Citizens who are subjected to a continuing vendetta of harassment, intimidation, and threats by official agents are being denied the fundamental benefits of organized society, which governments are instituted to provide. Under this Court's *Dolan* analysis, Petitioners' retaliatory efforts to extort an easement from Mr. Robbins clearly fits within the unconstitutional conditions doctrine, thereby violating Mr. Robbins' well-established rights.

## III

## PETITIONERS ARE WRONG THAT THE FIFTH AMENDMENT MERELY PROVIDES A REMEDY

Petitioners read the Fifth Amendment's Takings Clause not as guaranteeing the security of private property against unauthorized governmental intrusion, but merely as providing a "money remedy" when those intrusions rise to such a level as to become tantamount to outright expropriation. *See* Pet. Brf. at 28-30, 41-44. But such a reading confuses the right with the remedy. The Fifth Amendment affirms the traditional right of free citizens—embodied in Pitt's famous aphorism, quoted above—to be secure in the exclusive possession of their homes and land against unauthorized entry by government agents. It is true that the Takings Clause *goes beyond* the rights recognized at common law, by setting forth a condition upon which the government may override the right of exclusive possession—i.e., by purchasing the property outright. Payment of just compensation, in other words, allows the government to "trump" the citizen's right to exclusive possession. But no plausible reading of the clause could grant government agents the "right" to enter and re-enter private property at will, over the clearly expressed prohibition of the owner, so long as a court

does not hold them liable for compensation at inverse condemnation.

The source of individual rights against the government is not the government, as Petitioners argue. Pet. Brf. at 41. The Fifth Amendment "confers" no rights, but merely recognizes and enunciates the fundamental, historic right of all free people not to have their property invaded by the government or its agents except upon payment of just compensation under the power of eminent domain. Petitioners have never alleged, and do not allege now, that just compensation has ever been offered to Mr. Robbins. Therefore, Petitioners' conduct in this case violates the Fifth Amendment on its face, by its plain terms.

## CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals should be AFFIRMED and the case remanded to the district court for trial.

Respectfully submitted,

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In The

# Supreme Court of the United States

CHARLES WILKIE, ET AL.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE PARAGON FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICUS CURIAE

The Paragon Foundation, Inc. is a New Mexico 501(c)(3) non-profit organization created to support and advance the fundamental principles set forth in the Declaration of Independence and Constitution of the United States of America.[1] The Paragon Foundation, Inc. advocates for individual freedom, private property rights, and limited government controlled by the consent of people. The Paragon Foundation, Inc. has several thousand current or former members nationwide.

Amicus' interests lie with ranchers and property owners. Amicus is interested in fair, lawful treatment of all ranchers and property owners by the federal government and its officials without undue or improper interference with private property rights. Consistent with its mission, Amicus is well positioned to bring to the attention of the Court relevant material that will assist the Court in the disposition of this case.

## SUMMARY OF ARGUMENT

The court of appeals' judgment should be affirmed. The court of appeals correctly applied *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny in denying Petitioners' qualified immunity defense.

[1] This brief is submitted with the consent of the parties. Pursuant to Rule 37.6, Amicus affirms that no party or their counsel authored, or paid for, this brief in whole or in part. This brief is filed with consent of the parties pursuant to Rule 37.3(a).

In denying Petitioners' qualified immunity defense, the court of appeals found that Respondent had sufficiently alleged that Petitioners violated clearly established constitutional rights under the Fifth Amendment and clearly established statutory rights under the Hobbs Act, 18 U.S.C. §1951 and Wyoming law concerning extortion, giving rise to a claim under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, et seq. Contrary to Petitioners' argument, Petitioners' qualified immunity defense was not merely rebutted by Respondent with allegations of improper motives on the part of Petitioners.

Petitioners' arguments, if successful, would result in a *de facto* merger of the defense of qualified immunity with the defense of absolute immunity. In cases where improper motive is part of plaintiff's affirmative case, legal and factual inquiry is appropriate prior to a final ruling on the defense of qualified immunity.

## ARGUMENT

### I. THE OBJECTIVE TEST FOR QUALIFIED IMMUNITY SET FORTH IN *HARLOW* AND ITS PROGENY IS NOT AT ODDS WITH RESPONDENT'S SUBSTANTIVE CLAIMS THAT INCLUDE IMPROPER MOTIVE AS AN ELEMENT.

Alexander the Great's sword is not readily available to the parties to cut through the Gordian knot that is qualified immunity. Thus, the Court is again called on to cut that knot. At issue here is the objective test for qualified immunity under *Harlow* and its progeny and its interplay

with the alleged improper motives of Petitioners that constitute an element of Respondent's affirmative case.

From the seminal case of *Harlow* forward, qualified immunity has been a matter of balancing public policy considerations. *Harlow*, 457 U.S. at 813-14. Since *Harlow* was decided in 1982, the Court has addressed the issue of qualified immunity in more than twenty cases.

*Harlow* held that bare allegations of malice should not subject government officials to suit and that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 817-18. "Under that standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). While "evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of plaintiff's affirmative case." *Id.* at 589. However, *Harlow* did not "delete the state of mind inquiry from every constitutional tort calculus." *Crawford-El*, 523 U.S. at 589, fn. 11 (citing Justice Ginsburg's comments from *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1987) when she was a judge on the District of Columbia Circuit).

*Hartman v. Moore*, ___ U.S. ___, 126 S.Ct. 1695 (2006), decided after the court of appeals' decision in this case, is consistent with *Crawford-El*. "[R]etaliation is subject to recovery as the but-for cause of official action

offending the Constitution." *Hartman*, 126 S.Ct. at 1701 (citations omitted). Pleading and proving lack of probable cause in a retaliatory prosecution case is required. *Hartman, supra*. "Probable cause or its absence will be at least an evidentiary issue in practically all such cases." *Hartman*, 126 S.Ct. at 1707.

The "state of mind inquiry" is relevant when a plaintiff must plead and prove malice or improper motive as part of its affirmative case. Thus, an uneasy balance is struck between the objective test of *Harlow* and its progeny and the element of malice or improper motive that constitutes an essential component of certain substantive statutory and constitutional claims.

## II. THE COURT OF APPEALS CORRECTLY ANALYZED THE QUALIFIED IMMUNITY DEFENSE UNDER *HARLOW* AND ITS PROGENY, FINDING THAT RESPONDENT SUFFICIENTLY ALLEGED THAT PETITIONERS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT AND CLEARLY ESTABLISHED STATUTORY RIGHTS UNDER THE HOBBS ACT AND WYOMING LAW, GIVING RISE TO A RICO CLAIM.

Under the broad heading of "Qualified Immunity," the court of appeals divided its discussion into two categories: the Fifth Amendment and RICO. Subsumed under RICO was a discussion of the Hobbs Act and Wyoming law. The court of appeals held that Petitioners' conduct was actionable under the Fifth Amendment and RICO and that Petitioners were not entitled to qualified immunity. Pet. App. 16a, 18a. The court of appeals' holdings should be affirmed.

Under the Fifth Amendment, the court of appeals found that Respondent had the well established right to exclude the federal government from his property and that retaliation by Petitioners for exercise of that right to exclude was actionable. Accordingly, Petitioners were not entitled to qualified immunity on Respondent's *Bivens* claim[2]. Under RICO, the court of appeals concluded that "Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties" and therefore "their conduct is actionable." Further, under RICO, the court of appeals found that Respondent had sufficiently alleged a violation of clearly established statutory rights under the Hobbs Act and Wyoming law concerning blackmail and therefore denied Petitioner's qualified immunity defense.

The court of appeals' decision makes clear that there is an element of alleged improper motive on the part of Petitioners. The court of appeals described that improper motive as "retaliation," "intent to extort," and "accused or threatened to accuse [Robbins] of various crimes to obtain a right-of-way." Pet. App. 15a, 18a, 21a, and 25a. The court of appeals described Petitioners' alleged conduct as "egregious," and supported its view of egregiousness by reference to Respondent's submissions of evidence in the district court. Pet. App. 22a, fn. 5.

The defense of qualified immunity is generally resolved without reference to the substantive constitutional claims alleged against a public official. *Crawford-El*, 523

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[2] *Bivens* claims arise from *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

U.S. at 589. Where improper motive is an element of a substantive constitutional claim, that motive is not strictly relevant to resolution of the qualified immunity defense. *Id.* at 588. However, state of mind inquiries may be relevant to whether Respondent can make out a statutory or constitutional violation in the first instance. *Id.* at 589, fn. 11 (citations omitted).

The court of appeals was careful to avoid the trap of allowing improper motive alone to rebut the defense of qualified immunity. With regard to the *Bivens* Fifth Amendment claim, the court of appeals found a clearly established "Fifth Amendment right to exclude the government from private property" and accordingly found that "the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful." Retaliation implies an improper motive and is an essential element of Respondent's substantive constitutional claim. However, it was the clearly established nature of the Fifth Amendment right to exclude the government from private property and the resulting violation of that right that defeated Petitioners' defense of qualified immunity, not the improper motive of retaliation alone.

With regard to the RICO claims, in denying the qualified immunity defense, the court of appeals concluded that "Defendants engaged in lawful actions with an intent to extort a right-of-way from Robbins rather than with an intent to merely carry out their regulatory duties" and more specifically that Respondent had adequately alleged a violation of clearly established statutory rights under the Hobbs Act and Wyoming law sufficient to support a RICO claim. The improper motive element of Respondent's RICO claim was secondary to the finding that Respondent adequately alleged a violation of clearly established

statutory rights under the Hobbs Act and Wyoming law sufficient to support a RICO claim. Claims under the Hobbs Act and Wyoming law concerning blackmail necessarily include an element of improper motive. The qualified immunity defense should not succeed merely because Respondent has chosen to pursue claims that have an element of improper motive.

It may be argued by Petitioners and Amici in support of Petitioners that the court of appeals abandoned the objective test in *Harlow* and its progeny in favor of a subjective test focusing on the intent of the public official. That is manifestly not the case. The court of appeals was careful to not let improper motive alone rebut the defense of qualified immunity. Moreover, without knowing the outcome of the *Hartman* case at the time, the court of appeals arrived at the correct result under that case given the alleged egregiousness of Petitioners' conduct. *See*, *Hartman*, 126 S.Ct. at 1704, fn. 7 (quoting the underlying court of appeals' decision, "[a] *Bivens* recovery remains possible, however, in those rare cases where strong motive evidence combines with weak probable cause to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus). The court of appeals hewed closely to the objective test for qualified immunity set forth in *Harlow* and its progeny and did not give the element of improper motive inherent in Respondent's claims dispositive effect in its qualified immunity analysis.

## III. PETITIONERS' ARGUMENTS, IF SUCCESSFUL, ELIMINATE THE DISTINCTION BETWEEN QUALIFIED IMMUNITY AND ABSOLUTE IMMUNITY.

Petitioners' arguments on the defense of qualified immunity, if successful, would result in a *de facto* merger of the defense of qualified immunity with the defense of absolute immunity. The distinction between the two immunities would be meaningless. Resolution of the defense of qualified immunity would turn on a bare legal inquiry largely divorced from the facts of a case. However, there must be some weight given to the facts developed by Respondent and submitted as evidence to the district court which the court of appeals described as showing the "egregious nature of [Petitioners'] alleged conduct." Qualified immunity if it is to mean something other than absolute immunity must involve a legal and factual inquiry.

Quick judicial resolution of the qualified immunity defense without resort to factual inquiry would further the goal of early termination of insubstantial lawsuits but at the cost of depriving certain valid claimants of relief. However, that policy is at odds with Justice Marshall's comments in *Marbury v. Madison*, 5 U.S. 137, 163 (1803): "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Likewise, *Bivens* claims would be gutted; constitutional violations by public officials would go undeterred and uncompensated. Finally, the curious effect of merging qualified immunity with absolute immunity *sub silencio* is that there cannot be effective public debate on the issue and therefore no

legislative fix for what appears to be an intractable judicial problem.

## CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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CHARLES WILKIE, et al.,

*Petitioners,*

v.

HARVEY FRANK ROBBINS,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF THE PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, WYOMING PUBLIC LANDS COALITION, OREGON CATTLEMEN'S ASSOCIATION, AND NEVADA CATTLEMEN'S ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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## STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, Public Lands Council, National Cattlemen's Beef Association, Wyoming Public Lands Coalition, Oregon Cattlemen's Association, and the Nevada Cattlemen's Association submit this brief as *amici curiae* in support of Respondent Harvey Frank Robbins ("Mr. Robbins").[1]

Public Lands Council ("PLC") is an organization of public lands ranchers throughout the West, formed by the National Cattlemen's Beef Association, American Sheep Industry and Association of National Grasslands. PLC's mission is to create and maintain a stable regulatory regime in which its members can operate economically profitable ranches on private and public lands.

National Cattlemen's Beef Association ("NCBA") is the national trade association representing U.S. cattle producers – the largest sector of American agriculture. NCBA works to advance the economic, policy, and social interests of the U.S. cattle business. The protection of private property rights is of critical importance to cattle producers, who often rely upon use of both private and public lands in their business.

Wyoming Public Lands Coalition is an unincorporated affiliation of the Wyoming State Grazing Board, the Wyoming Wool Growers, and the Wyoming Stock Growers organized for the purpose of representing all the federal

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief.

land permittees in Wyoming on issues such as property rights, grazing permit administration, wildlife, and others. Additionally, members of the coalition provide science-based technical advice on rangeland management issues.

Oregon Cattlemen's Association and Nevada Cattlemen's Association serve as the political and legal voice of the cattle industry in Oregon and Nevada, respectively. A major part of their mission is the protection of the rights of ranchers to make reasonable use of their property.

*Amici curiae* represent ranchers and cattlemen throughout the United States. These groups interact extensively with the federal government, especially in the Western United States, where public and private lands are often intermingled. There are thousands of ranchers who pay for and rely on the use of public lands to sustain their livelihood and their way of life. By the same token, the government relies on the use of private lands to access and manage public lands. As a result, the relationship between ranchers and the government is usually mutually beneficial. On occasion, however, there is a significant danger that the government will take advantage of its overwhelming power to affect the lives and businesses of ranchers and other property owners. Especially in light of what occurred in this case, *amici curiae* are deeply concerned about the protection of private property rights, and ensuring that adequate safeguards exist to prevent government officials from improperly coercing property owners into relinquishing their rights, or retaliating against individuals who exercise their constitutionally protected property rights.

## SUMMARY OF ARGUMENT

This case squarely presents the question of whether property rights are as important, and worthy of protection, as other liberties protected by the Bill of Rights. For the sake of property owners, ranchers, and anyone else who desires to exercise the fundamental rights and liberties protected by our Constitution, the answer to this question must be a resounding "yes."

Mr. Robbins did what any property owner has the right to do when another seeks to use his property: he sought to negotiate the terms and conditions of that use, and when the terms offered were not satisfactory, he said "no." Under normal circumstances, that would end the story. But Petitioners in this case, several Bureau of Land Management ("BLM") officials, did not stop there. Instead, the BLM officials engaged in a pattern of abuse, coercion, and retaliation to obtain rights to Mr. Robbins' land and to punish him for exercising his basic rights as a property owner.

The conflict between the BLM officials and Mr. Robbins highlights the importance of property rights and their protection, for those rights are the foundation of our system of government. The Framers of our Constitution believed that personal freedoms would not exist without protecting property rights from improper government interference. As a result, the Constitution protects the entire bundle of property rights created by state law. The ability to exclude others, including the government, from one's property is one of the most fundamental aspects of property rights. Without the right to exclude, the very idea of property becomes little more than an empty promise.

Recognizing the importance of protecting property rights, the Framers adopted the Fifth Amendment's Takings Clause as a bulwark against improper government interference. The Takings Clause protects property rights, including the right to exclude, by conditioning the government's ability to take private property for public use on providing just compensation. The BLM officials seek to undo this crucial protection by denying relief to property owners whose rights are trampled before an actual taking occurs. They argue that government officials can coerce individuals into giving up their right to demand just compensation, or retaliate against them for exercising their rights, with impunity.

The danger of coercion or retaliation is especially prevalent for ranchers. Ranchers often must negotiate with the government for the use of public land, and in return they must sometimes bargain away the rights over their own lands. In such circumstances, there is a heightened danger that the government will attempt to evade the limitations on taking private property under the guise of negotiation. Absent protections against improper coercion or retaliation, the right to just compensation, as well as the right to exclude others from one's property, will be rendered meaningless. Such an outcome would set a dangerous precedent for property rights and other freedoms protected by the Constitution.

## ARGUMENT

### I. THE RIGHT TO EXCLUDE IS A FUNDAMENTAL RIGHT IN OUR SOCIETY.

The BLM officials violated the fundamental right of all property owners to exclude others from one's property. Government officials, just like private citizens, must respect the right to exclude. For ranchers like Mr. Robbins, the danger posed by the government's interference with property rights is far greater than that for average citizens because of the intermingled nature of public and private property in the West. The Tenth Circuit appropriately concluded that a remedy must exist when government officials improperly interfere with the constitutionally protected right to exclude outside the eminent domain process, and its decision is consistent with the fundamental nature of property rights in our society.

#### A. Property Rights and Personal Liberties Have Equal Status Under the Constitution.

Property interests are created by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Once created, the Constitution – particularly the Fifth Amendment – protects the entire bundle of property rights. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

The Framers of our Constitution recognized that property rights are the foundation upon which our personal freedoms are built. David J. Callis and J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 39-40 (2000) ("Property rights, and particularly rights in land, have always been fundamental to and part

of the preservation of liberty and personal freedom in the United States."). As John Adams said in 1790, "'[p]roperty must be secured . . . or liberty cannot exist.'" James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 43 (2d ed. 1998) (*quoting* Discourses on Davila, in Charles Francis Adams, ed., *The Works of John Adams*, 10 vols. (Boston: Little Brown 1851) vol. 6, p. 280); *see also Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) ("'[a]lmost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.'") (citations omitted).

The Fifth Amendment embodies the intention of the Framers to protect property rights as much as other basic personal freedoms. The Amendment protects against double-jeopardy, self-incrimination, and the deprivation of "life, liberty, or property" without due process of law. U.S. Const. amend. V. Immediately following these important protections, the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." *Id.* This proclamation enshrines the critical right of property owners to exclude the government from their property, or to demand compensation if the government refuses. The Takings Clause does not, by implication or otherwise, empower or authorize the government to take private property through any other means. In the most basic terms, the Takings Clause "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *General Motors Corp.*, 323 U.S. at 377.

The decision to include the Takings Clause alongside basic personal freedoms against self-incrimination, double jeopardy, and the deprivation of life, liberty or property

without due process of law demonstrates the close connection between personal liberty and property rights. James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 54 (2d ed. 1998). It should come as no surprise that people need "security against both arbitrary punishment and deprivation of property." *Id.* Mr. Robbins' odyssey amply demonstrates that principle.

### B. The Fifth Amendment Protects the Right to Exclude Others, Including the Government, From Private Property.

The Fifth Amendment undeniably protects the right of property owners to exclude others, "especially the Government," from their property. *See, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991). This Court has "repeatedly held that . . . 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (*quoting Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 435-36 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."), *and Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In fact, the "'right to exclude' [is] universally held to be a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179-80. *See also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Thus, if the government takes away the right to exclude, it owes compensation. *Kaiser Aetna*, 444 U.S. at 179-80. In light of its importance, courts must "tenaciously guard[]" the right to exclude. *Cable Holdings of Georgia, Inc. v. McNeil Real Estate*

*Fund VI, LTD*, 953 F.2d 600, 605 (11th Cir. 1992), *cert. denied*, 506 U.S. 862 (1992).

On numerous occasions, this Court has been called upon to prevent the government's attempt to evade the Fifth Amendment's limitations after it took away the property owner's right to exclude. For example, this Court has found that a compensable taking occurred when the government or municipalities: built a road over private land to allow the public access to a reservoir, *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979); conditioned building permits on the grant of an easement, *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374; required property owners to allow cable boxes on their buildings, *Loretto*, 458 U.S. 419; and attempted to declare that a privately owned pond was a navigable water subject to public use after the owners dredged it, *Kaiser Aetna*, 444 U.S. at 180.

In this case, the BLM officials attempted to evade the just compensation requirement of the Fifth Amendment through coercion, and they retaliated against Mr. Robbins for exercising his right to exclude. Despite the fact that Mr. Robbins did not give in to the coercion and retaliation – and, therefore, no taking occurred – the BLM officials nevertheless violated his right to exclude. To deny a right of recovery under these circumstances would essentially eviscerate the Fifth Amendment's limitations on the government's power to take private property, and expose property owners to unlawful conduct for the exercise of their basic constitutional rights.

## II. THE FIFTH AMENDMENT PROHIBITS THE GOVERNMENT FROM COERCING PROPERTY OWNERS INTO GIVING UP THEIR RIGHT TO JUST COMPENSATION.

As this Court has recognized, "[m]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). The Fifth Amendment is a broad guarantee of private property rights, and it significantly limits the government's ability to interfere with such rights. U.S. Const. amend. V; *see also General Motors Corp.*, 323 U.S. at 377. "If the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Robbins v. Wilkie*, 433 F.3d 755, 766 (10th Cir. 2006).

Despite this clear mandate, the BLM officials would have this Court believe that the Fifth Amendment's prohibition on taking private property is so narrow that it can be evaded with ease. They contend that federal officials are free to coerce property owners into giving up their rights. In their view, so long as no taking occurs, the Fifth Amendment presents no obstacle to such strong-arm tactics. This Court should reject the BLM officials' invitation to apply such an unduly restrictive view of the Fifth Amendment in this case.

### A. The Doctrine of "Unconstitutional Conditions" Prohibits the Government From Coercing a Property Owner into Giving Up Protected Property Rights.

This Court has previously recognized, and rejected, the potential power to extort property interests. For example, in *Nollan*, a municipality conditioned a building permit on the property owners' willingness to provide a public easement across their property. This Court stated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" 483 U.S. at 837 (citations omitted). Likewise, in *Dolan*, the Court reiterated the inability of the government to place "unconstitutional conditions" on government benefits, such as the waiver or relinquishment of the right to just compensation in exchange for a discretionary benefit that has little or no relationship to the property at issue. 512 U.S. at 385.

These cases confirm the common-sense principle that the government cannot coerce or extort a property owner into giving up certain property rights. Although the cases arose in the context of the government attempting to place unconstitutional conditions on certain benefits through its regulatory authority, the doctrine cannot be limited to that context. If the government cannot extort a property interest through regulation, then it should go without saying that the government is prohibited from extortion through other means outside of the official regulatory process, such as using threats, intimidation, or other wrongful acts to achieve its purpose. Without protection against coercion, the right to exclude and the right to just compensation are worthless, yet that is the precise result

the BLM officials seek in this case. What happened to Mr. Robbins exemplifies the danger of government officials attempting to place unconstitutional conditions, through improper conduct, on the exercise of a basic constitutional right.

### B. The Right to Exclude May Be Violated Regardless of Whether an Actual Taking Occurs.

The BLM officials argue that because they did not successfully extort or coerce Mr. Robbins into giving up a property interest, he has no remedy for their egregious and improper conduct, all of which damaged him and his business. Of course, had the BLM officials succeeded in their plan, Mr. Robbins still would be without a remedy because he would have "voluntarily" negotiated away his rights. The Court should reject this "Catch-22" argument and protect property owners from coercion, regardless of whether an actual taking occurs. Mr. Robbins' saga amply demonstrates the danger of coercion in the ranching context.

The road to Mr. Robbins' ranch crosses some of his own land, as well as public lands. When he bought the ranch, Mr. Robbins had a right-of-way over the public lands, but the BLM did not properly record an easement negotiated with the prior landowner for use of the road over Mr. Robbins' property. Mr. Robbins was willing to negotiate an equivalent right-of-way for the BLM, but the BLM wanted no such negotiation. J.A. 123 (former BLM official testified that BLM officials "wouldn't negotiate" with Mr. Robbins). The BLM proposed an irrevocable, 20-year easement that would allow the BLM, its assigns and licensees "full use" of the road as it passed over

Mr. Robbins' land, subject to some restrictions on mineral development. J.A. 86-87. In exchange, Mr. Robbins could keep his existing right-of-way to use the same road as it passed over federal lands, though he would need to pay the BLM fair market value ("reduced" in exchange for his grant of an easement to the BLM), have limited ability to use and maintain the road, and give the BLM the authority to revoke the right-of-way. J.A. 94, 97-103. Not surprisingly, Mr. Robbins concluded that the right-of-way and proposed easement were not reciprocal and that more negotiation was warranted.

Rather than negotiate, however, the BLM officials began a campaign to "bury" Mr. Robbins in an effort to coerce him into giving up more rights than could be justified under the pertinent regulations. Pet. App. 29a. In other words, they wanted Mr. Robbins to give up his property rights to evade the just compensation requirement of the Fifth Amendment, and they had the means to accomplish that goal. Knowing that Mr. Robbins needed access to public lands for his livelihood, they cancelled his grazing and special use permits on false pretenses. *See* J.A. 124 (former BLM official testified that he was asked to look into potential range violations by Mr. Robbins even though "he didn't have a range problem[] with Mr. Robbins."). They also refused to maintain the road so that Mr. Robbins could access his land; threatened to cancel Mr. Robbins' right-of-way over the federal land unless he granted the BLM an easement over his land, and later cancelled the right of way; bragged they were going to "bury Frank Robbins;" falsely accused him of a crime; trespassed on his land; and harassed his guests. Pet. App. 29a-30a. Essentially, they targeted him for different treatment as a way of coercing a property interest. *See*

J.A. 127, 129 (in response to a question as to whether the BLM treated Mr. Robbins different than other permittees, a former BLM official testified, "Of course he was." He later explained that he was asked to "spend more time there, look closer, watch closer, investigate harder.").

Thus, contrary to the BLM officials' argument, Mr. Robbins' case is not based upon the wrongful denial of his access to public lands. (Pet. Br. at 44.) Instead, he claims that the BLM officials placed an "unconstitutional condition" on his use of public lands, *i.e.*, the waiver and relinquishment of his right to demand an equivalent easement over public lands, or to demand just compensation. Further, as the above laundry list indicates, the BLM officials did much more than merely interfere with Mr. Robbins' use of public lands – they substantially interfered with the use of his own land.

If the Court accepts the BLM's invitation to prohibit a remedy for even the most outrageous violations of the right to exclude simply because an actual taking did not occur, then the Fifth Amendment's "guarantee" of just compensation is an empty promise. Unscrupulous government officials, or even those who have the best of intentions, can too easily evade the requirement for just compensation through coercion, extortion, abuse or harassment, and that is exactly what happened to Mr. Robbins. J.A. 125 (former BLM official testified that "people given authority and not being held in check and not having solid convictions will run amuck and that it [sic] was I saw happening" to Mr. Robbins). The Court should therefore confirm the Tenth Circuit's view that the government cannot interfere with property rights except by exercising its legitimate authority under the Takings Clause.

### C. Ranchers Face a Heightened Danger of Unlawful Coercion.

The danger of coercion is heightened in situations where property owners must regularly negotiate with the government for the use of public lands, as the government will often have an interest in obtaining rights to the owner's private lands. *See Nollan*, 483 U.S. at 841 (when the government seeks to condition certain benefits on the provision of an easement, there is a "heightened risk" that the government may seek more than it is otherwise entitled to in an attempt to avoid the compensation requirement of the Fifth Amendment). What appears to be a simple negotiation may be nothing more than a plan of extortion to obtain property interests without paying just compensation. *Id.* at 837 ("The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.").

As this case demonstrates, the ability of the government to manage the public lands is too easily manipulated into a justification for improper conduct. The record does not support the BLM officials' benign characterization of their conduct as merely seeking a reciprocal easement to manage public lands pursuant to their regulatory authority. Instead, the facts adduced below show a pattern of behavior, not justified by any regulation or other authority, designed to coerce Mr. Robbins into acceding to the BLM officials' demands for an easement.

Normally, reciprocity interests and bona fide negotiations will allow property owners and the government to avoid these types of disputes. *Leo Sheep*, 440 U.S. at 681. However, as *Leo Sheep* demonstrates, there are times

when the government will refuse to negotiate in good faith and attempt to take private land without paying just compensation. In *Leo Sheep*, the government attempted to negotiate with a property owner to develop a road across private land to allow the public access to a reservoir. 440 U.S. at 678. When negotiations failed, the government simply built the road across both private and public lands, but it did so without exercising its eminent domain power. *Id.* The property owners sued the government to quiet title, and this Court ultimately agreed that the government had effected a taking that required just compensation. *Id.* at 687-88.

In the BLM officials' view, if the government had threatened or coerced the property owners in *Leo Sheep* into agreeing to the road over their land without any payment, that would be permissible. They fail to explain, however, why the government should be able to obtain through threats or improper conduct what it is otherwise prohibited from obtaining without the payment of just compensation.

### D. A *Bivens* Remedy Is Needed to Prevent Government Officials From Abusing Property Rights Outside of the Eminent Domain Process.

Under the BLM officials' view, there is no remedy for their egregious conduct toward Mr. Robbins. They contend that federal officials are not empowered to effect a taking and thus cannot trigger the just compensation requirement. (Pet. Br. at 29, 41-42.) They further contend that the Administrative Procedures Act precludes relief for those

actions not subject to agency review. (*Id.* at 34-35.) That is exactly why a *Bivens* remedy is needed. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The BLM officials' protestations against a *Bivens* remedy are based in part on the contention that such a remedy will inhibit government officials from doing their job or negotiating reciprocal interests. (Pet. Br. at 39.) Of course, they fail to acknowledge the laundry list of inappropriate conduct described above, or the realities of the situation. The BLM officials ask this Court to assume that negotiations between the BLM and private landowners are identical to negotiations between two private citizens. This Court rejected such an argument in *Bivens*, aptly stating:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

*Bivens*, 403 U.S. at 391-92. When federal officials are involved, private citizens may not be able to resist what the official wants. *Id.* at 395. Absent a check on authority, government agents may run rampant over private landowners' constitutionally protected property rights. *See* J.A. 132 (former BLM official warned Mr. Robbins that if he fought with the BLM, it would be a war, and the BLM would "outlast him and outspend him."). Those rights must be protected, whether in the context of an actual

taking (through just compensation) or through improper coercive conduct designed to evade the just compensation requirement.

This Court's decisions in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), do not, as the BLM officials contend, support the conclusion that a deprivation of constitutionally protected rights is unprotected absent an actual taking of property. (Pet. Br. at 42.) In *Williamson*, the Court concluded that a takings or due process violation claim was not yet ripe because the property owner had not exhausted all potential remedies, such as seeking a variance to a zoning code. However, that case "did not establish that compensation is unavailable for government activity occurring before compensation is actually denied." *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 320 n.10.

In *Ruckelshaus*, the Court refused to enjoin a potential taking that was "duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016 (footnote omitted). Here, on the other hand, Mr. Robbins asserts that the BLM officials did not take actions that were authorized by law (such as trespassing on his land, inciting disputes with his neighbors, cancelling his permits on false pretenses, bringing false criminal charges against him, and videotaping guests on his ranch), nor can he bring a suit for just compensation because he was able to withstand their efforts to coerce a taking of his property. Despite his successful resistance, however, Mr. Robbins has suffered great harm due to the exercise of his constitutional rights.

Therefore, the Tenth Circuit appropriately concluded that the Fifth Amendment prohibits government officials from attempting to evade the requirement to pay just compensation for taking private property through coercion. Contrary to the BLM officials' view, the just compensation requirement does not merely protect the right to exclude others only *after* a taking has occurred. If the Court reverses the Tenth Circuit, it will send the signal that it is acceptable to extort property rights and thereby substantially diminish one of the most significant protections afforded by the Constitution.

## III. THE COURT MUST PROTECT INDIVIDUALS WHO ASSERT THEIR CONSTITUTIONAL RIGHTS FROM GOVERNMENT RETALIATION.

Just as the government or its officials may not coerce a property owner into giving up his or her rights, they must also be prohibited from retaliating against people for exercising their Fifth Amendment rights. A property owner should be able to exclude the government from his property without fear of repercussions.

### A. Like the First Amendment, the Fifth Amendment Protects Against Retaliation.

Even though retaliation is not expressly referenced in the Constitution, courts protect against it because "[r]etaliatory actions may tend to chill individuals' exercise of constitutional rights." *American Civil Liberties Union of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (*citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The BLM agents concede that protections exist against retaliation for the exercise of First Amendment

rights, and that the Fifth and First Amendments are "of course entitled to equal footing." (Pet. Br. at 38.) Nevertheless, they urge this Court to place the First and Fifth Amendments on unequal footing by limiting anti-retaliation protections to the First Amendment context. Such an argument is inconsistent with this Court's precedent, and would open a Pandora's Box in terms of interpreting and enforcing the freedoms protected by the Bill of Rights.

Thankfully, this Court has already rejected the idea that the Fifth Amendment is entitled to lesser status than the First: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392. It is true that the First and Fifth Amendments protect different interests. But there is no basis to suggest that one interest is more important than the other. Indeed, a two-tiered approach to constitutional rights – in which the exercise of some rights is worthy of protection, whereas the exercise of others is not – would weaken the entire fabric of the Constitution. *See Block v. Hirsh*, 256 U.S. 135, 160 (1921) (McKenna, J., dissenting) ("The 'strength of the fabric' [of the Constitution] cannot be assigned to any one provision, it is the contribution of all, and therefore it is not the expression of too much anxiety to declare that a violation of any of its prohibitions is an evil – an evil in the circumstance of violation, of greater evil because of its example and malign instruction.").

Just as in the First Amendment context, the failure to protect against retaliation would likely inhibit property owners from exercising their constitutionally protected

right to exclude the government from their property, or to demand just compensation. *See Wicomico County*, 999 F.2d at 785. Further, even though the Fifth Amendment contemplates some degree of interference with property rights, that alone does not indicate that the "right to exclude" is entitled to some lesser degree of protection. Instead, the express limits placed on the manner in which the government may interfere with private property rights suggests that any other type of interference must be prohibited. Certainly the Framers did not imagine that the Constitution would permit the forced relinquishment of a right enshrined in the Bill of Rights.

Therefore, although certain actions – such as penalizing a rancher for a minor infraction of a grazing permit – might otherwise be acceptable, when those actions are taken for the purpose of punishing an individual for exercising his constitutionally protected rights, the courts must provide a remedy. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990). Just as a government employee could not be fired for speaking out on a matter of public concern, a property owner should not be punished for exercising the right to exclude, regardless of how that right is exercised.

By negotiating a right-of-way, an equivalent easement, a reciprocal easement, or other aspects common to ranchers who interact with government officials, ranchers are exercising their Fifth Amendment rights. If they had no right to exclude others, and no right to just compensation, there would be no impetus for negotiation – the government would simply take what it wanted. Therefore, the First Amendment will not necessarily protect those ranchers whose only "crime" is to negotiate with the government, as is their right under the Fifth Amendment.

### B. The Right to Exclude Includes the Ability to Say "No" to the Government.

As set forth above, the right to exclude, if it is to have any meaning at all, must include more than the ability to demand just compensation after a taking has occurred. At a minimum, if the government seeks to impose unconstitutional conditions on the grant of a permit or right-of-way, or otherwise attempts to coerce an owner into giving up the right to just compensation, the property owner must be entitled to say "no" without fear of repercussions. Without such a basic guarantee, the right to exclude will be meaningless.

The ability to exercise the right to exclude without fear of retaliation is critical to those who must regularly interact and negotiate with the government due to intermingled public and private lands. Property owners must have the ability to force the government to exercise its eminent domain powers when appropriate. Otherwise, the possibility for bona fide negotiations between private property owners and the government will be substantially diminished, and the fundamental right to exclude others will have no substance.

## IV. RECOGNIZING A RETALIATION CLAIM WILL FURTHER IMPORTANT PUBLIC POLICY GOALS.

Lastly, the BLM officials contend, without any support, that recognizing a cause of action for retaliation under these circumstances will "upset the legitimate give and take" that occurs between landowners and government officials, implying that federal officials will be exposed to too much potential liability for doing their job. (Pet. Br. at 39.) Nothing could be further from the truth.

The facts involved in this case are unusual and egregious. As this Court stated in *Leo Sheep*, "[i]t is some testament to common sense that the present case is virtually unprecedented, and that in the 117 years since the [land] grants were made, litigation over access questions generally has been rare." 440 U.S. at 686-87. There are thousands of ranchers using public lands, and many or most of them regularly interact with federal officials related to the reciprocal uses of public and private lands. The BLM officials suggest that recognizing a claim here will inhibit officials from doing their job, but that is not the case. It is not a BLM official's "job" to trespass on ranchers' land, videotape their guests, incite arguments with their neighbors, or threaten to "bury" them. Recognizing a claim here merely acknowledges the potential for government abuse, which does occur from time to time, and ensures that there will be a remedy when government officials go too far.

Even assuming that recognizing a cause of action might result in additional claims, some meritorious and some not, that is no basis for refusing to guard against the violation of constitutional rights. *Breen v. Kahl*, 419 F.2d 1034, 1038 (7th Cir. 1969) ("To fail to hold such arbitrary regulations unconstitutional because of fear of opening the floodgates to litigation, some meritorious and some not, would be an abdication of the judiciary's role of final arbiter of the validity of all laws, and protector of the people, young and old, from the governmental exercise of unconstitutional power."), *cert. denied*, 398 U.S. 937 (1970). Therefore, this Court should reject the BLM officials' suggestion that recognizing a claim under these circumstances will inhibit the BLM officials from doing their job. The Court must protect against the intentional and

egregious violation of Mr. Robbins' basic constitutional rights.

## CONCLUSION

The Court should affirm the Tenth Circuit's judgment and the case should be remanded for a trial on the merits.

Respectfully submitted,

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